S. HRG. 101-1170

DOLPHIN PROTECTION CONSUMER INFORMATION ACT

HEARING

BEFORE THE

NATIONAL OCEAN POLICY STUDY

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 2044

TO REQUIRE TUNA PRODUCTS TO BE LABELED RESPECTING THE METHOD USED TO CATCH THE TUNA, AND FOR OTHER PURPOSES

JULY 25, 1990

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DOLPHIN PROTECTION CONSUMER INFORMATION ACT OF 1990

WEDNESDAY, JULY 25, 1990

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
NATIONAL OCEAN POLICY STUDY,
Washington, DC.

The committee met, pursuant to notice, at 1:55 p.m. in room SR-253, Russell Senate Office Building, Hon. John F. Kerry presiding.

Staff members assigned to this hearing: Penny Dalton and Mike Nussman, professional staff members; John Moran and Earl Comstock, minority staff counsels.

OPENING STATEMENT BY SENATOR KERRY

Senator KERRY. The hearing will come to order. My profound apologies to all of the witnesses and to staff and everyone attending. Unfortunately, we were supposed to have back-to-back, 15-minute votes, but for one reason or another, they got prolonged and we had about a half-hour vote because a couple of Senators got lost on their way to the Hill.

The result is that we are unconscionably late. I hate to do that and I apologize to all. I know that your time is as valuable as ours. Obviously, this will cut into the hearing time because of the upcoming proceedings with Senator Durenberger which we must all attend.

I am not going to make a long opening statement. Senator Biden will be on his way momentarily. Congresswoman, thank you very much for your patience also. We are very appreciative.

I would like to commend Senator Biden and Representative Boxer for their legislation which significantly adds to the dialogue on the entire issue of dolphin protection in the eastern tropical Pacific.

No one really knows exactly why it is that large yellowfin tuna flock underneath dolphin, but fishermen have obviously figured it out over the years and the results are that fishing techniques have been developed to take advantage of that reality. Years ago there was, as we all know, an extraordinary amount of dolphin killing taking place, with losses in the hundreds of thousands annually.

About two years ago, in conjunction with the reauthorization of the Marine Mammal Protection Act, this Committee was shown a film by Sam LaBudde of the Earth Island Institute which has since gained significant exposure. The film footage depicted serious abuses of some of the tuna fishing techniques. That film, coupled with a general consumer awareness and sensitivity to the issue, helped prompt people to put together legislation that would accomplish more than we seemed able to do up to that point in time.

As one of the primary authors of the 1988 amendments, I think we managed to put together something that certainly moved in the right direction. We tried to find whatever one could best define as an equitable balance between conservation and marine mammal protection issues, as well as the rights of fishermen to continue plying their trade.

There were many issues at stake at that time, some of them complex, some of them very emotional, and I am not sure that things have changed that much. But I do think that we have made some advances.

There has been a reduction in dolphin mortalities, though not as much as everybody wants because, obviously, the number everyone wants is zero. But the fact is that a new system of performance standards for skippers was put into place. The 1988 legislation also required significant increases with respect to observer coverage, a ban on explosive devices for herding dolphins, a National Academy study to develop new fishing techniques new that would not harm dolphins, and even an effort to leverage foreign fleets into compliance by restricting market access. Those amendments are now being implemented because we all felt that this issue was important.

It is not insignificant that the company that produces this particular can of tuna, StarKist, followed by two other companies, Bumble Bee and Chicken of the Sea, joined in the effort. The result is a huge commercial statement which will have its own impact on the policy that we are going to discuss today. And it is precisely the questions that must be faced as a consequence of the step to label cans either dolphin unsafe or safe that raises a whole new set of issues about how far and how quickly we really can go with this effort, what we can achieve, what the cost will be, who will oversee it and who is impacted as a consequence of it.

So, without further ado, let me turn to the various experts who will testify today, beginning with the leading proponents of this legislation, which we welcome as an important addition to the dialogue. The Committee is going to examine this legislation very carefully, with a view toward trying to reach that target goal of zero dolphin mortalities.

So, Congresswoman Boxer, thank you very much for your participation. You and I have worked together on a number of issues over the years, and I am delighted to welcome you here to the Committee and to recognize your leadership on this issue.

Let me just turn to my colleague, Senator Breaux, who has consistently been active on this issue, and ask if he has any opening comments he would like to make.

Senator **BREAUX**. No comments. Thank you.

Senator **KERRY**. All right. Thank you, John.

Also, Antone Pressler, Senator Pressler's father, passed away this past weekend. Senator Pressler is in South Dakota this week attending the funeral services. Although he is unable to attend this hearing, the Senator will have a statement for the record when he returns to Washington.

[The statements and bill follows:]

OPENING STATEMENT BY THE CHAIRMAN

Seventeen years ago, Congress passed the Marine Mammal Protection Act of 1972 (MMPA) in response to popular sentiment and growing concern for the welfare of marine mammals. In the intervening years, we have reauthorized the MMPA several times, modifying its provisions to develop a balanced and comprehensive Federal program for marine mammal conservation and management. Through this legislative process, I've been involved in efforts to protect marine mammals for almost two decades. Strong public interest has been a sustained factor supporting my efforts and those of my colleagues for the entire period.

Today's hearing will evaluate the effectiveness of the steps we have taken to stop the needless killing of dolphins in tuna harvesting operations. In doing so, primary consideration must be given to the impact of the recent decision by U.S. tuna canners to market only "dolphin safe" products. The voluntary labeling program adopted by these tuna processors signals an important shift in the industry's commitment to addressing this problem. It also provides consumers with the means to translate their longstanding public interest into stronger dolphin protection policies.

In addition, the Committee is considering S. 2044, introduced by Senator Biden on January 30, 1990, which would establish a mandatory labeling program for tuna products. This legislation would require that a product label indicate whether fishing methods which are potentially harmful to dolphins had been used in catching tuna. The objective of the legislation is to establish strict certification and verification procedures to authenticate tuna products as "dolphin safe". However, there remains legitimate concerns that the legislation could place the U.S. tuna fleet at a competitive disadvantage and that dolphin mortalities will not drop if foreign fleets continue to set on dolphins and market "dolphin-unsafe" tuna to markets outside the United States. In addition, development of a system for tracking tuna products in international commodity markets could be both difficult and costly.

Clearly, the considerable effort that Congress has invested in revising the MMPA, the recent action taken by tuna canners to initiate a voluntary labeling program, and the legislation before us, share a common goal—reducing dolphin deaths. Our task now is to evaluate the different approaches to determine how we can best achieve this goal.

OPENING STATEMENT BY SENATOR PRESSLER

Mr. Chairman, I first want to thank you for holding this hearing on the Dolphin Protection Consumer Information Act. This is a very serious issue we will be addressing, and I want to stress from the outset my deep concern over tuna fishing techniques that result in dolphin deaths.

I'm certain that we've all heard, through the media or other sources, of the damage done to the dolphin population by the netting of tuna. I also feel that none of us are insensitive to the plight of dolphins. However, our purpose is not to assess and affix blame. Rather, we are here today to find solutions to this problem.

With that, Mr. Chairman, I will close my opening remarks. I look forward to hearing from all of our witnesses today.

101st CONGRESS
2d Session

S. 2044

To require tuna products to be labeled respecting the method used to catch the tuna, and for other purposes.

IN THE SENATE OF THE UNITED STATES

January 30 (legislative day, January 23), 1990

Mr. Biden (for himself, Mr. Lieberman, Mr. Jeffords, Mr. Wirth, Mr. Moynihan, Mr. Pell, and Mr. Simon) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To require tuna products to be labeled respecting the method used to catch the tuna, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Dolphin Protection Consumer Information Act of 1990".

SEC. 2. FINDINGS.

The Congress finds that—

(1) there is an existing threat to dolphins, porpoises, and whales in the form of purse seine netting of

these species and through driftnets and other methods and technologies;

(2) consumers have the right to know whether the tuna that they purchase were procured through methods or technologies which kill, harass, or endanger these species; and

(3) a requirement of labeling of tuna products would provide that information to consumers.

SEC. 3. LABEL REQUIREMENT.

(a) IN GENERAL.—

(1) The label of all tuna products containing tuna which are, in whole or in part, caught with—

(A) drift gill nets of more than one and one-half miles in total length;

(B) purse seine nets in the Eastern Tropical Pacific Ocean, unless certified as "Dolphin Safe" under subsection (b) of this section;

(C) any purse seine nets set on dolphin in other marine areas; or

(D) other methods or technologies as the Secretary may find that kill, harass, or endanger these species (except that tuna caught with staked gill nets less than 1.5 miles, and technologies and methods in use as of the date of enactment of this Act, other than those enumerated in clauses (A) through (C), are not subject to this labeling requirement);

and which are processed, sold, imported, exported, or otherwise placed into commerce in the United States shall, regardless of the country of origin, bear the following statement: "THE TUNA IN THIS PRODUCT WAS CAUGHT WITH METHODS THAT KILL DOLPHINS".

(2) Other tuna products processed, sold, imported, exported, or otherwise placed into commerce in the United States may bear the following statement: "DOLPHIN SAFE".

(3) The statement required by paragraph (1) shall be located in a conspicuous place on the label of every can, box, or other package containing any tuna product sold for consumption or other use; shall be as proximate as possible to the name of such product; and shall appear in conspicuous and legible type no smaller than 4 millimeters in height, contrasting in typography, layout, and color with other printed matter on such label.

(4) The importer of consumer-ready imported tuna products shall be liable for the label and recordkeeping requirements of paragraph (1). The processor of all

other tuna products shall be liable for such requirements.

(b) CERTIFICATION.—The Secretaries of Commerce and of Health and Human Services shall prescribe recordkeeping requirements that will facilitate verification of information needed to enforce this section, including the form of "Dolphin Safe" certification which shall—

(1) include a statement that the trip to or through the Eastern Tropical Pacific Ocean did or did not include use of purse seine nets deployed on or around dolphin;

(2) be executed by the vessel captain and by an independent on-board compliance observer approved by the Secretary of Commerce or by the Inter-American Tropical Tuna Commission; and

(3) be endorsed by each exporter, importer, and processor of tuna or products containing tuna caught as described in subsection (a)(1) of this section.

(c) MISLEADING LABEL.—A can, box, or package containing any tuna product will be deemed to be mislabeled—

(1) if it is not labeled in accordance with subsection (a); or

(2) if its label contains any false or misleading information pertaining to dolphins, porpoises, or whales.

(d) It is unlawful for any person to sell, or to advertise, market, offer for sale, or place into commerce in, or export from, the United States any tuna product that is not in compliance with the recordkeeping and labeling requirements of this section.

SEC. 4. ENFORCEMENT.

(a) IN GENERAL.—The Secretary of Health and Human Service, acting through the Food and Drug Administration, and the Secretary of Commerce shall implement this Act through a program that shall include but not be limited to frequent inspections to determine whether records required by this Act are being accurately maintained and whether tuna products are being labeled in accordance with section 3, and that any other requirements of this Act or regulations adopted pursuant to it are being met.

(b) CITIZEN SUIT.—Any person may commence a civil action seeking injunctive or other relief against any other person, including the Secretary, who is alleged to be in violation of this Act or regulations promulgated thereunder, or to compel the Secretary to perform any duty required by the Act.

SEC. 5. JURISDICTION OF THE COURTS.

(a) IN GENERAL.—The district courts of the United States and United States courts of the territories shall have jurisdiction over any action arising under this Act.

(b) Costs.—In issuing any final order in an action brought pursuant to this Act, the court shall award all reasonable costs of litigation (including, but not limited to, reasonable attorney, investigative, and expert witness fees) to any party unless the court determines the award is not appropriate.

SEC. 6. PENALTIES.

(a) Criminal.—Any person who violates section 3 or regulations promulgated pursuant to section 3, or an injunction or restraining order issued pursuant to this Act shall be imprisoned for not more than one year or fined a minimum of two times the fair market value of the tuna product that is the subject of the violation and an additional fine of no more than $100,000, or both fined and imprisoned, except that if any person commits such a violation after a conviction of that person becomes final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than 3 years, or fined four times the fair market value of the tuna product that is the subject of the violation and an additional $300,000, or both fined and imprisoned. The Secretary of Commerce shall also cancel, or suspend for a period of up to one year, any certificates of inclusion under the Marine Mammal Protection Act of 1972 or other Federal fishing certificates or permits issued to any person who is convicted of a criminal violation of any provision of this Act.

(b) CIVIL PENALTIES.—Any person who violates any provision of this Act or any regulation promulgated pursuant to it, may be assessed a civil penalty by the Secretary or the courts, of up to $100,000 or twice the fair market value of the tuna product that is the subject of the violation, or both.

(c) DISPOSITION OF FINES.—Fines and proceeds from the sale of confiscated goods received as a result of violations of this Act shall be retained by the Secretary of Health and Human Services and by the Secretary of Commerce in equal amounts, subject to appropriations, and be allocated within 2 fiscal years, in consultation with the Marine Mammal Commission, to the implementation of dolphin conservation programs and protection regulations.

SEC. 8. DEFINITIONS.

For the purposes of this Act—

(1) the term "Eastern Tropical Pacific Ocean" or "ETP" means that area of the Pacific Ocean bounded by 40 degrees N. latitude, 40 degrees S. latitude, 160 degrees W. longitude, and the coastline of North, Central, and South America, or as otherwise expanded in area by the Secretary of Commerce under 50 Code of Federal Regulations 216.24(e)(9)(ii)(C).

(2) the term "label" means a display of written, printed, or graphic matter upon or affixed to the immediate container of any article.

(3) the term "tuna product" means any food or non-food goods which contain tuna, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days.

SEC. 9. PROMULGATION OF REGULATIONS.

Within 180 days of the date of the enactment of this Act, the Secretaries of Commerce and of Health and Human Services, after consultation with the Marine Mammal Commission established by section 201 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1401), shall conclude a memorandum of understanding and publish proposed regulations for the implementation of this Act. Such regulations shall be promulgated in accordance with section 553 of title 5, United States Code, except that each such Secretary shall provide no more than 90 days for the submission of data, views, or arguments on the proposed regulations.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated—

(1) not to exceed $4,000,000 for fiscal years 1991, 1992, 1993, 1994, and 1995 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act; and

(2) not to exceed $2,000,000 for fiscal years 1991, 1992, 1993, 1994, and 1995 to enable the De-

partment of Health and Human Services to carry out such functions and responsibilities as it may have been given under this Act.

○

Senator Kerry. Congresswoman.

STATEMENT OF HON. BARBARA BOXER, U.S. REPRESENTATIVE FROM CALIFORNIA

Ms. Boxer. Thank you so much, Senator, for having this hearing. It is so important that we move quickly on this issue. I think all of the pieces are there, the information is there. And I think the legislative road, at least to me, seems fairly clear.

I wanted to make a comment to Senator Breaux. I remember when we served together when you were in the House on the Merchant Marine Committee and we worked to save the Pribiloff seals. I do not know if you recall that, but it was a very important thing that we did and now we have a chance to save the dolphins. So it would be a nice thing to do.

Senator Breaux. And we saved them.

Ms. Boxer. Yes, we did save them, up in Alaska. It was a good thing that we did. So, I hope that we can repeat it for the dolphin.

I do not know whether you have seen the cans, but they are hitting the shelves right now, the StarKist cans that say dolphin safe, and so here they are. And as a result of the interest of this Congress of both the Senate and the House, and the introduction of the bill by Senator Biden and myself, I think, and of course with the consumers who have been outspoken on this, I think it has moved to this point. And now I think what we have got to do is just take this whole issue over the finish line, and that is why I am here today to suggest to you that we do that.

As you pointed out, Senator, on April 12th, 1990 the Nation's three largest tuna companies, StarKist, Bumble Bee and Chicken of the Sea, announced that they would not only comply with the Dolphin Protection Consumer Information Act by labeling their tuna products, but would also go the final step and sell dolphin-safe tuna exclusively.

As I told you, I believe the decision was made in response to continued congressional scrutiny and of course, increasing consumer awareness and concern about the senseless slaughter of dolphins in the eastern tropical Pacific. As a result, thousands of dolphins have already been spared the tuna nets.

Despite their policy reversal, the promise offered by these companies' actions may not be realized unless the Boxer-Biden labeling legislation is enacted.

As evidenced by the industry's decisions, consumers do not want dolphins killed to catch the tuna they eat, particularly when there are dolphin-safe alternatives. It has long been my belief, and it is the premise of the Boxer-Biden bill, that if consumers are provided with accurate information about the methods used to harvest tuna, they will choose dolphin safe and the market will respond accordingly.

But on the other hand, if the consumers are provided with inaccurate, false or no information about whether tuna is dolphin safe, this will give rise to a disincentive for the international adoption of the U.S. tuna industry policy.

It is thus essential that the industry decision be fortified by the provision of accurate consumer information, a uniform dolphin-safe standard and the regulatory framework for monitoring and enforcement.

Other than the statements of a few tuna boat owners, who I am sure you will hear from—we have been going from hearing to hearing with them, this is about the third time we have taken this bill around—there is virtual consensus that the collective effect of the industry announcement and the labeling legislation will be a significant reduction in the killing of dolphin.

Already the decrease in dolphin mortality is apparent. According to data provided by the National Marine Fishery Service, dolphin mortality has dropped to less than one-half the rate of kill that occurred before the industry announcement. If Congress lends its support to the commendable actions of the Nation's three largest tuna companies, dolphin mortality will continue to drop and the U.S. fleet will benefit.

Of the 11 U.S. boats currently fishing on dolphin, three boats are currently fulfilling the final months of their contracts and have committed to go dolphin safe by October. This means that all but eight U.S. tuna boats would qualify for the dolphin-safe label by October, giving them a considerable leg up on their foreign competitors.

The foreign tuna fleets are also beginning to respond to the handwriting on the wall. The Intra-American Tropical Tuna Commission reports that foreign countries have intensified their request to that body for observers to certify that their operations are dolphin safe. And I want you to know, under our bill, if a foreign fleet does not have an observer on board, then their catch cannot get the dolphin-safe label. So, we have leveled the playing field, and there is no argument that we have not done that. We improved the bill to do that. No foreign fleet will get dolphin-safe label unless there is an observer on the boat.

More good news on the foreign reaction to the dolphin-safe movement was announced at a recent meeting here. Ecuador, the fourth largest tuna fishing presence in the ETP announced its boats would fish using only dolphin-safe methods. Also, a number of other tuna companies and trade associations have followed StarKist's lead with announcements that they would trade exclusively in dolphin-safe tuna. Among those that will follow suit are the Thai Food Processors, the French Canners Association, and four more of the leading U.S. tuna companies, Mitsubishi, Mitsui, Pan Pacific Cannery and the Ocean Packing Corporation. Dolphin-safe tuna will soon account for over 90 percent of the domestic tuna market.

So, in light of all this good news, you might want to ask why is tuna labeling legislation still needed. I think the following incident will illustrate the need.

On May 2d, 1990, representatives of the few tuna boats that are fighting to continue fishing on dolphin, came to my office and announced their plan to purchase their own tuna cannery, expressing confidence that they could defeat the tuna labeling bill. They added that they would continue killing dolphins in their nets, yet market that tuna with dolphin-safe labels.

Indeed, absent a uniform labeling law, this fraud could be perpetrated with impunity. Not only would these unscrupulous boat owners avoid the sanctions included in the Boxer-Biden bill, but unless a standard definition for dolphin safe is established, they would also avoid liability under the two relevant truth in advertising laws, the Lanham Trademark Act and the Federal Trade Commission Act.

The opponents of this bill are counting on congressional inaction and consumer confusion to allow them to continue to profit on what has become a discredited practice within the industry. Not only would this do the American consumers a disservice, but by keeping the dolphin-unsafe market viable in the U.S., this would provide a disincentive for worldwide adoption of dolphin-safe policies and threaten the substantial progress offered by the industry's actions.

In conclusion, we spend an awful lot of time around here criticizing industry for placing profits above the environment and the public good. Now we have an opportunity to lend support to companies that have listened to the American public and have chosen corporate responsibility over short-term selfish needs. I urge the Senate Commerce Committee to move quickly to mark up on this bill and nail down the progress offered by our tuna industry's leadership.

And I am so pleased to see Senator Biden is here because we have worked on this together for several months, and it has involved one particular person in the Senator's family, a daughter who is very anxious that this bill become law. So, we have a lot of motivation to make it happen.

Senator KERRY. Thank you very much, Congresswoman. We probably should have asked his daughter to come and testify.

Senator BIDEN. She would have done a better job or at least with more intensity.

Senator KERRY. We appreciate your descriptions, Congresswoman, of the Boxer-Biden bill. We are now going to hear descriptions of the Biden-Boxer bill.

Senator BIDEN. That is for sure.

Senator KERRY. Senator Biden, I should say, has been pressing me to hold this hearing, because it has been difficult to accommodate the schedule of the Committee. His devotion to this issue is clear. He has wanted to see this issue move, and I am delighted to welcome him here.

And, Joe, before you came, I thanked both of you for your leadership, but I thank you while you are here and we look forward to your testimony.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., U.S. SENATOR FROM DELAWARE

Senator BIDEN. Senator Kerry, Senator Breaux, I am sure that Congresswoman Boxer has laid this out very clearly. I have a statement, and rather than me take about 10 minutes to read the statement, I ask that it be placed in the record and allow me to summarize. I would appreciate it.

Senator KERRY. Without objection, it is so ordered.

Senator BIDEN. As you both know, there are times in this Congress and in this Senate, when one truly can claim credit for an idea. You work on it for years and years, you attempt to bring it to fruition, and you can say with all good conscience that you are the sponsor.

Well, I am the sponsor of this legislation, but this is Congresswoman Boxer from the beginning to the middle to the end. It needs a Senate sponsor and I am delighted and I was anxious and I am committed to the legislation.

But to set the record straight in terms of whether this is a Biden-Boxer or a Boxer-Biden, this is a Boxer with a long hyphen and then Biden—and then 27 of our colleagues on this side of the Capitol. And when I introduced, after having been opportuned by Congresswoman Boxer, what is now S. 2044 in late January, with six co-sponsors, we were in a circumstance where, I did not think that either Barbara or myself thought that we were going to be able to get the kind of movement we got from the industry.

And the industry has been very straightforward. When the H.J. Heinz Company, owners of StarKist Tuna contacted us, they made no mistake about it that they were moved to their action by a whole lot of reasons, not the least of which was the introduction of this legislation.

And to the surprise—at least my surprise, I think to the surprise, to some degree, of the environmental community as well as the Congresswoman—other companies followed and fell in line very, very quickly.

And so I want to publicly acknowledge and thank the leadership of StarKist and the H.J. Heinz Company—I did not think I would be sitting in the Senate chamber thanking the H.J. Heinz Company so profusely, but in fact I am and they deserve the thanks.

But what I hear from a number of our colleagues, now, even those who are co-sponsors, they say, well, Joe, you did it already, did you not? I mean, it is done. What do we need legislation for now?

And if I could speak very briefly to that, Mr. Chairman. This bill is badly needed for several reasons: number one, so that we do not find ourselves in the situation that—and maybe the Congresswoman has spoken to this already—that others are able to, through a label that, in fact does not mean what StarKist means when they put this label on, dolphin safe, which means they did not fish on dolphin to acquire the tunafish in this can.

There is a way in which other companies now, if they so chose, could come forward and say something similar or the exact same thing, and it not mean the same thing. Some could argue it means dolphin safe in that there is no dolphin in this can. And there would be truth in labeling. "Dolphin free," they could claim.

So there is a reason for there to be some uniformity legislatively, in making sure that the change that has taken place is not undercut today, tomorrow, next week, next year, by other companies less scrupulous than StarKist and Bumble Bee—and I am sure I am leaving a couple out—Chicken of the Sea, are at this moment.

In 1972, landmark wildlife conservation legislation, The Marine Mammal Protection Act, was signed into law. The law established—as you know better than any of us—a national goal of reducing dolphin mortality to, and I quote, "an insignificant level approaching zero."

This Committee has been in the forefront of the often contentious debates over the effort to move toward the goal of zero mortality in the years since the law has passed. And it should be clear that all of those efforts to date have led to tremendous reductions in the number of dolphin deaths in the eastern tropical Pacific.

Over our 18 years of experience with the Marine Mammal Protection Act, our national goal has remained the same. What has changed are the means available to reach these goals. The tuna fleet developed a number of changes in technology, and fishing practices have brought them towards that goal. But ultimately, we were left well short of that goal.

But tuna companies found that dramatic change was developing in terms of public attitude and they have moved. I will not go into further comment on that, as their actions have been fully described already.

Finally there is a question as to what effect this legislation will have on domestic tuna fleets. There can be no doubt that the American tuna fleet is in for change. But with or without our legislation these changes will occur.

The last point seems to be one of a certain amount of confusion. Opposition to this bill will not reverse the policies of the canneries in question. They are locked in, at least for the foreseeable future. It would be a horrible marketing catastrophe, making Coca-Cola's judgment with new Coke pole by comparison.

They would be writing about it in the "Wall Street Journal" for some time to come about the marketing impact it would have.

So the fact of the matter is, the impact upon the fleet is essentially going to remain the same whether or not we pass this legislation. I am not diminishing the consequence of the impact upon a group of honorable, decent fishermen who have significant investments of some consequence. And although they are not that many, the impact is real in terms of the changes they will have to make in the way in which they go about maintaining the catch that they expect.

So there are a number of questions. I do not want to take more of the Committee's time. I am happy to try to answer the questions. But suffice it to say that one of the things that has happened here, and I think it is a reasonable thing for us to acknowledge, is that the consumers of this country have made a judgment, and the producers and processors have responded to that judgment—a judgment that is environmentally sound and reflects a changing attitude that the United States Senate should be a part of, not a roadblock to.

And so I would hope that we would able to move with a favorable vote this legislation out of Committee. And again, I would like to publicly thank you, Mr. Chairman. I know how busy you have been. You have had a number of Committee hearings you have been chairing including ones in which I serve with you—on the Foreign Relations Committee—and I do appreciate you scheduling this hearing.

And Senator Breaux, who knows a great deal about this issue, I know, from my discussions with him, I appreciate his being here as well.

And lastly, I want to once again pay my tribute and thanks to the environmental groups who have been so helpful in drafting some of the changes we made in the legislation in the Senate side. But what I really want to do is acknowledge the full, total credit for this effort goes—to the extent that those who like it—and for those of you who do not like it, the full, total credit for this legislation also goes to Congresswoman Boxer.

Senator **Kerry**. Thank you very much, Senator Biden.

I just have one question. I think we want to move to the other panels, but there are, obviously, opponents to the legislation. I think the administration is among them.

There is the articulated view that this proposed policy will disadvantage our fleet relative to the foreign fleet. And that in point of fact, it may encourage further killing of dolphins by inviting the foreign fleet to avoid the American market and look for other markets. These markets are smaller, but enough that the foreign fleet could fish without any restraint whatsoever and say, "We are going to kill dolphin, because we are not going to bother to sell to those people."

What is your comment with respect to that view? It is the one question I would like to raise with you.

Ms. **Boxer**. I will open it and then toss it to my colleague here.

First of all, 90 percent of the U.S. tuna companies are committed to this. So whatever we do, they are committed. And there are, as I understand it—and I would be glad to be corrected if I am wrong with this information—essentially only eight tuna boats left who are purse seining on dolphin.

And on those boats there may be three to five U.S. citizens on each boat. And then there is a crew which is mostly made up of other than U.S. citizens. So I do not think the impact on U.S. citizens, per se, is great. And I think what we need to do here is to make a decision that the Marine Mammal Protection Act is excellent, is wonderful.

But we also have to acknowledge that we are not going down to that zero level. So it is time to move ahead.

I think, in my view, that the U.S. companies that have chosen this high road are going to benefit. I think, in fact, that they are leading the way. And as I quoted in my testimony, whether it is in Thailand, or in France, or in other places, people are following their lead.

So I really have to tell you that I think there is a level playing field. One more point that I made in my testimony—we were sensitive to this issue. In the first draft of our bill we were not satisfied. So we went back when the Senator put his effort into the bill. And he put more into it than he is saying here.

He pointed out that what we really need to do is make sure that we enforce the rule that all foreign fleets have observers on them. If these observers are not on these fleets, they cannot sell the tuna as dolphin safe.

So I think all that added up says to me that what we are doing is right for the dolphin. What we are doing is right for the consumers. What we are doing is right for business. What we are doing is right in reference to the Marine Mammal Protection Act. We are just taking it another step and I do not think we are disadvantaging anybody. I think people will get used to this new circumstance.

Senator BIDEN. Mr. Chairman, I misunderstood the question because I thought you were talking a little more about what is the effect on the dolphin, as opposed to the effect on the companies.

Senator KERRY. Both.

Senator BIDEN. Let me respond to what I think, quite frankly, is the strongest argument against this legislation—not strong enough in my view, but I think it is a legitimate concern to be raised.

And that is, and I heard it this weekend from some tuna fishermen. And they said, Biden, look, great. We think what you are doing is fine and we understand what you want to do and save the dolphins. But two things are going to happen, one of which is, when you make sure that these folks, all of us, cannot fish on dolphins and, further, that no one else can sell on the U.S. market, whether they are Japanese or whomever they are, by fishing on dolphin. The end result is you are going to get all of us out of this area and the Japanese are going to come in and they are just going to come in and fish on dolphin and take the whole catch and what they are going to do is to kill more dolphin than are being killed now because they will not have any restriction. They know they are not going to be able to sell on the U.S. market anyway. And given the opportunity to have our share of the dolphin catch or access to our market, they would rather take our share of the dolphin catch.

My answer to that is twofold: Number one, other countries have been pointed out, are moving out in this direction. And I think there is an inevitability to where this is going to go, so that the market in which they sell—obviously Japan, if you take the Japanese, for example, would be a market where they can continue to sell.

And there are other countries where, I have been told, the consumption of tuna is up that do not have such restrictions and they may be able to sell there for a while.

But eventually, what is going to happen is more and more countries, more and more consumers around the world are going to be insisting on what we are insisting. And the number is relatively small. The number of people for whom there is a market in those areas where these restrictions would not apply is small and shrinking. But there is a broader answer than that.

And I know your work in the arms control area for years and years. And if I can make an analogy—it may seem inappropriate. It is a little bit like what I have heard for years in the Foreign Relations Committee about arms sales. They say to me from the Nixon Administration on, Biden, if you oppose the arms sales of that weapon or this weapon or that bomb or this bomb to that country, we are going to lose control. What is going to happen is we are going to pull out and it is going to get worse, because the British are going to come in and sell, or the French are going to come in and sell, or the Germans are going to come in and sell. Or the Russians are going to come in and sell.

And my answer to that is, if it is wrong, it is wrong, it is wrong. And ultimately a nation has to take a stand. I cannot control other than by my example what foreign nations are going to do. It is wrong for us to be fishing on dolphin when the end impact is 100,000 or more—notwithstanding the good efforts of the Marine Mammal Act—are dying.

So I say it is wrong as a matter of fact. We should set the example. But in fact it has a limiting impact upon the markets available and makes tougher choices for those who think now, great, we are just going to go in and do it anyway, and let it rip.

Senator **Kerry**. Thank you for those answers.

Senator Breaux?

Senator **Breaux**. Thank you, Mr. Chairman. I want to join you in thanking our colleagues for their presentations. I think Barbara and Joe both present this legislation to the Senate and to our Committee with the utmost good intentions and are very sincere in their thoughts and their expressions of what they feel the legislation will do.

I want to make it very clear that I totally disagree with the conclusion. I think ultimately the result of a bill of this type would have exactly the opposite effect of the good intentions expressed by our colleague.

I think it is appropriate that consumers respond to advertising, and that is their right. But we in the Congress have to respond to good science. The administration including Dr. Fox and other NOAA scientists who are the experts in this field, will tell us that this legislation is exactly the opposite approach because of what it will do to the U.S. fleet. That fleet has done an outstanding job—we ought to be writing them a citation of commendation, not putting them out of business—since we have passed the Marine Mammal Protection Act.

The take of dolphin in the world has decreased dramatically in recent years. When I got involved in this in the early 1970s we were killing 400,000 dolphins a year. Last year, because of good practices and good management, the U.S. tuna fleet took somewhere around 12,000 dolphins. That is an outstanding reduction and it is getting better each year.

There has been a lot of advertising recently regarding the dolphin-safe tuna issue. I mean, I am looking at the can that the Chairman brought and listening to him about how "dolphin safe" is written all over a can of albacore. Now generally, harvesters do not catch albacore with purse seinenets. Of course it is dolphin safe. That is not how they catch albacore. So they could have put logos or labels on this can five years ago because they catch it by using a hook and line.

But anyway, we need to talk about the issue and I think our colleagues have raised some good points. I think we need to hear from the scientists and then we will have to make a determination. But I commend you for your enthusiasm and I know you have the very best intentions in bringing this to our attention.

Ms. **Boxer**. Mr. Chairman, if I could answer the question about albacore?

Senator **Kerry**. We would be delighted to have you do so.

Ms. **Boxer**. In our bill when we refined it, we added the issue of drift netting, which you know does catch albacore.

Therefore, if the albacore was caught in a drift net it could not have a dolphin safe label. So that is, in fact, part of the bill as a strengthening measure.

Senator **Biden**. Mr. Chairman, one last comment if I may.

As Chairman of the Judiciary Committee, I have often tried to figure out how we can get witnesses away from the witness table because they go on and on and on. Now I have figured how to do it. Put lights this hot in the Judiciary Committee. My goodness, do you all have a method to your madness? I compliment you on it. I am going to check with the sergeant-at-arms and see if we can insert lights this hot into the Judiciary Committee room.

Ms. **Boxer**. You are going to need them.

Senator **Biden**. Thank you very much.

Senator **Kerry**. I want to thank you both very much. We are going to let you out from under the lights and get a new panel in and fry them.

Senator **Biden**. Thank you, we appreciate it.

Senator **Kerry**. I would like to ask the administration representative, Dr. William Fox, who is accompanied by Mr. Charles Fullerton, to please come forward.

Gentlemen, I am going to ask you, because of the press of time and because we do want to stay close to the clock, if we could do summaries of your statements. Your full statement will be put into the record. I think it would be helpful to us if we were able to probe this issue with our questions. We do want to be able to get through with everybody.

So your full statements will be placed in the record. I would like to ask each of you to please just give a six minute summary.

Dr. Fox, I'm sorry, I believe you are the only one to give testimony. If you could do that in about six or seven minutes, we would appreciate it.

STATEMENT OF DR. WILLIAM W. FOX, JR., ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE; ACCOMPANIED BY CHARLES FULLERTON, REGIONAL DIRECTOR, SOUTHWEST REGION

Dr. Fox. Thank you, Mr. Chairman. I will try very hard to do so.

I have a rather lengthy statement, as you indicated, and, as you stipulated, it will appear in the record. I have an oral statement which accompanies these charts that I would like to show for the Committee's information.

My name is Bill Fox. I am Assistant Administrator for Fisheries in NOAA. It is a pleasure to be before you again this time to discuss tuna labeling legislation.

With me today, on my right, is our Southwest Regional Director, Mr. Charles Fullerton. Mr. Fullerton's region runs our tuna program and he is intimately familiar with the details of the issues before us today and will help me answer detailed questions that you may have.

We have brought some charts and I will refer to them in a few minutes to help demonstrate some of the economic and trade implications of the legislation you have under consideration.

Let me first mention the implementation of the amendments regarding dolphin protection.

What has happened in the last five years in this fishery is a tremendous growth in the amount of foreign fishing. Thus, although the U.S. kill of dolphins has declined during this time, the foreign kill has increased. The administration is committed to continuing progress toward zero dolphin mortality. And so, we believe it is imperative that we encourage and assist the foreign fleet to follow the lead of the United States.

For the U.S. fleet, we have implemented the requirements of the 1988 amendments. We are maintaining 100 percent observer coverage, and believe that we will be able to continue doing so.

We are continuing the research necessary to meet the deadline for a 1992 report to Congress on the status and trends in dolphin populations.

So far, we have not found any significant trends in dolphin populations, although we need to continue the studies to confirm this. The National Academy of Sciences is completing the study, which the amendments called upon them to do, on alternative fishing techniques.

We are continuing our enforcement program for 1989. We have made cases resulting in 40 violations with assessed penalties of $187,000 against U.S. fishermen. We are working hard to get the foreign nations to reduce their kills of dolphins. They have banned sundown sets and are in the process of completing the prohibition of explosives and implementing of skipper performance standards.

I have personally worked closely with the major fishing countries and believe that they are making their very best, good faith efforts to meet our comparability tests.

In my view, careful working with foreign governments is the most significant thing we can do right now to reduce the overall kill of dolphins in the tuna fishery.

We will be formally evaluating the results of the foreign fleet performance beginning next month. The reports are due to be submitted by the end of this month, so speculation about possible embargoes is still premature.

Mr. Chairman, the Committee also asked for some information concerning tuna labeling. At the outset, we should note that the National Marine Fisheries Service is a resource conservation agency. We have some responsibilities in the area of seafood technology, seafood inspection and fisheries trade, where we work closely with the U.S. Trade Representative and others in the administration.

But we largely come to this issue with an abiding concern for the conservation and welfare of the dolphin populations.

With that in mind, let me begin by reviewing some of what we know about the way tuna is treated as a worldwide commodity.

The first chart, which are attached to my statement here on my right, is a world map indicating all the countries that engage in the international trade of tuna. Those that ship tuna to the United States are highlighted in blue.

Our next chart shows where our tuna comes from. The three colors for each year show how much tuna our fishermen caught that was canned, the amount that was imported frozen for canning in the U.S., and the amount that was imported in the can.

The most significant part of the story here is the way the tuna canned overseas has become more significant in our market.

Our next chart shows where tuna imports come from. This includes frozen, as well as canned, product. The point to note here is the large number of countries that our industry imports product from.

There are five nations, in addition to the United States, that fish for tuna in the eastern tropical Pacific. They are dependent on the U.S. market to varying degrees. Our next chart shows how much for each country.

Note that for Mexico, which makes about half the total non-U.S. harvest of yellowfin tuna in the Eastern Pacific—approximately 147,000 tons in 1989 out of 298,000 tons—only 11 percent of their catch comes to the United States. There is some wide variation.

The next chart shows what we expect might happen to the U.S. fleet as a result of the decision by the U.S. processors to purchase only dolphin safe tuna. What it shows is that, by the time all of this sorts out, the vast majority of the U.S. fleet that was working in the eastern tropical Pacific will end up moving to the western Pacific, leaving the tuna stocks there open to others to fill in behind.

The last chart we have for you this morning is perhaps the most important. It tells as much as anything why the administration is opposed to these bills.

It shows the kill of dolphins over the last 20 years. It demonstrates the tremendous progress that has been made in reducing dolphin kills in the tuna fishery. It also shows that the major area of the problem today is in the foreign fleet.

As you can see, the difference between the red line and the black line has widened dramatically in the last few years.

It is logical to assume that great progress in conserving dolphins can come from using our influence to get these fleets to improve their performance. With this in mind, let me state that the Administration is opposed to the tuna labeling bills that are before Congress today.

As the chart notes, great progress has been made to protect dolphins in the past 20 years. We are confident that this will continue.

The government-mandated labeling program will only take our attention and energy away from the significant efforts that we have underway today. Moreover, the toughest problem today in protecting dolphins from tuna fishing is with the foreign fleets.

Under the current Marine Mammal Protection Act provisions, we are working with the other five countries that fish in the eastern tropical Pacific, and we believe they are making progress. The governments have implemented measures, as I mentioned before.

We believe that it would be counterproductive to expect them to comply with the labeling provisions at the same time. We think that we are moving into an area of overkill.

In addition, our information shows that tuna is an international commodity, and the paperwork burden of trying to track this product through intermediary nations would be enormous. We also believe that the GATT, the General Agreement on Trade and Tariff, implications need to be considered carefully, especially at this time, with the United States trying to work toward a successful completion of a Uruguay Round, with discussions of a Free Trade Agreement with Mexico.

Mr. Chairman, thank you again for the opportunity to be here. I would be glad to answer any questions at this time.

[The statement follows:]

TESTIMONY OF
WILLIAM W. FOX, JR.
ASSISTANT ADMINISTRATOR FOR FISHERIES
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

Mr. Chairman and Members of the Committee:

I am William W. Fox, Jr., Assistant Administrator for Fisheries, of the National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. I direct NOAA's National Marine Fisheries Service (NMFS). NOAA is the Nation's marine fisheries conservation agency. It is our job to conduct scientific research; manage the Nation's living marine resources; protect vital habitats and marine mammals; and oversee programs to assist the U.S. commercial and recreational fishing industries.

The Committee has requested that the Department provide an overview and assessment of the effectiveness of current efforts to protect dolphin and the impact of the recent decision made by U.S. tuna canners to purchase only "dolphin safe" tuna products. We were also asked to comment on **S. 2044**, the Dolphin Consumer Information Protection Act.

IMPLEMENTATION OF THE MARINE MAMMAL PROTECTION ACT AMENDMENTS

Although we are far from zero dolphin mortality at the present time, I believe we are making progress. The U.S. fleet, in particular, has continued to make significant progress toward reducing the mortality rate to levels approaching zero. With respect to foreign fleets, the trend in the number of dolphin killed and the rates of mortality have declined since 1986, but I am disappointed to learn that the number of dolphin deaths increased in 1989. I am aware, however, that the foreign governments and industry are working cooperatively in a sincere effort to comply with the Marine Mammal Protection Act (MMPA) amendments of 1984 and 1988, and believe that further improvements will be made as their programs mature.

In my testimony today, I briefly will review our progress in implementing the 1984 and 1988 tuna-dolphin amendments to the MMPA which affect both the U.S. and foreign tuna purse seine fleets operating in the eastern tropical Pacific Ocean (ETP). I also will review the status of dolphin stocks research, enforcement activities, and provide some observations on how the amendments are likely to contribute to the reduction of dolphin mortality in the future.

At the beginning of this year, six nations operated 96 tuna purse seine vessels greater than 400 tons that are capable of fishing yellowfin tuna in association with dolphin (Mexico - 51;

Venezuela - 26; Panama - 6; Vanuatu - 5; Ecuador - 8). The U.S. fleet began the year operating 28 vessels certified to catch yellowfin tuna taken with dolphin. About 70 percent of all sets made by the international fleet on yellowfin tuna involve dolphin. In 1989, the total dolphin mortality for the international fleet was 96,979 animals, up 23 percent from 1988. The dolphin mortality for the U.S. fleet was 12,643, down 36 percent from 1988; the non-U.S. fleet killed 84,336 dolphin, up 42 percent from the previous year.

The number of dolphin killed per purse seine set also increased 2.9 percent for the international fleet in 1989. This rate is significant in that it is the performance standard used to determine whether a nation has maintained a marine mammal program comparable with the United States which is required to allow their tuna to enter U.S. markets. The preliminary estimate of the U.S. kill-per-set for 1989 is 3.69, down 32 percent from 5.43 in 1988. An estimate of the non-U.S. fleet for 1989 is 9.27 dolphin per set or about 2.5 times the U.S. rate.

The Inter-American Tropical Tuna Commission (IATTC) reports that the number of sets on dolphin increased to 12,580 in 1989, an increase of 19.6 percent. The amount of yellowfin tuna caught in dolphin sets increased by 32.8 percent, the highest on record.

These data represent a significant change in activity from the time the MMPA was passed in 1972, when 185 purse seine vessels fished yellowfin tuna in the ETP and over 400,000 dolphin were killed in the fishery. Even with half the number of purse seine vessels and one-quarter the dolphin mortality, we still have a long way to go to reach our goal of zero mortality.

With this brief introduction, I will now discuss our progress and accomplishments in implementing the 1988 tuna-dolphin amendments to the MMPA which apply to the U.S. and foreign harvesting and intermediary nations. I would like to recognize at this point the cooperation and advice from several conservation groups, tuna industry representatives, and key members of your staff during several meetings held to formulate the following regulations necessary to implement the amendments.

Domestic Requirements

The specific requirements identified in the 1988 amendments which apply to the U.S. tuna fleet have been implemented.

A prohibition banning the setting on dolphin after sundown became effective January 1, 1989, unless a vessel operator obtained an annual exemption which certified that the rate of dolphin mortality for the operator's sundown sets did not exceed the average daytime mortality for the U.S. fleet. Of the 68 vessel operators in the U.S. fleet, nine requested an exemption for the 1989 season. Of these nine requests, four were approved and five were denied.

An experimental fishing permit provision became effective on January 6, 1989 which allows NMFS to waive certain procedural regulations to encourage the development of new dolphin saving techniques in the purse seine fishery. No applications have been received since this rule became effective.

Effective January 1, 1989, only class "C" explosives (seal bombs) could be used aboard U.S. tuna vessels, and then only in a manner that did not harm dolphin. However, based on findings of a workshop convened by our Southwest Fisheries Center, this rule was amended and a complete prohibition on the use of explosives in any set involving marine mammals became effective on April 1, 1990.

A rule implementing a skipper performance system became effective on May 17, 1990. The proposed system resulted from consultations with conservation groups, tuna industry representatives and key members of your staff. Under this system, the performance of each skipper is reviewed and certified at the completion of each trip. Remedial actions have been taken against two skippers since the system was put in place.

The 1988 amendments to the MMPA also required that every certified U.S. vessel carry an observer on every departing trip beginning with the 1989 season. I am pleased to report that we have achieved 100 percent coverage since January 1, 1989. We also have implemented observer accommodation regulations which provide for the placement of female observers on board tuna vessels. With the continued full cooperation of the IATTC, I foresee no immediate problems that would diminish our ability to maintain the 100 percent coverage.

Before proceeding with the status of implementing the amendments for foreign nations, this seems to be an appropriate place to review the status of other U.S. programs related to the 1984 and 1988 MMPA amendments. These programs include: research on the status and trends of dolphin populations, research on alternative fishing methods not associated with dolphin, and enforcement activities.

Status and Trends Research on Dolphin Populations

Two NOAA ships will depart from San Diego on July 29, 1990 to conduct the fifth of six research surveys on the status and trends of dolphin populations in the ETP. The objective of the surveys is to collect information to estimate the density, size, and species composition of dolphin schools. The primary target species taken incidentally in the ETP purse seine fishery are stocks of spotted dolphin, spinner dolphin, common dolphin, and striped dolphin.

A report prepared by our Southwest Fisheries Center following the third survey completed in 1989 indicates that estimates of relative abundance for all stocks of spotted and spinner dolphin were substantially higher than 1988 estimates. Estimates of relative abundance for all stocks of common and striped dolphins were lower than in 1988, but higher than 1986 or 1987. Trend analysis so far shows that there are no significant trends in population abundance for any of the target stocks. We are required by the MMPA to report to Congress in 1992, concerning the status and trends of dolphin population abundance. This report will be based upon six surveys, and will be integrated with environmental data and fourteen years of observer data to improve the reliability of the analysis.

Recommendations from a panel of survey design experts who convened at the Southwest Fisheries Center on July 10-11, 1990, indicated that: 1) the surveys should be continued for another five years with two vessels to obtain sufficient population data for an acceptable trend analysis; 2) the survey objectives should alternate between obtaining information on trends and minimum population sizes over the five year period; and 3) data from the tuna vessel observer program should be combined with the trends data to improve estimates.

Alternative Fishing Methods

The National Academy of Sciences (NAS) is completing the contract study to evaluate alternative fishing methods to fishing tuna associated with dolphin. Their report, required in the 1988 amendments to the MMPA, is due in September 1990 and is expected to recommend new fishing techniques as well as improvements in the purse seine. NMFS has requested that the NAS panel give special consideration to techniques which do not directly involve dolphin.

I view this area of research as very high priority and have begun a cooperative program with the IATTC and tuna industry to initiate three demonstration projects in anticipation of the recommendations expected in the NAS report. Two of the projects investigate techniques which do not involve dolphin; one project seeks to eliminate a major cause of gear malfunctions involving sets on dolphin.

Based on preliminary work by the IATTC, subsurface fish aggregating devices (FADS) will be deployed in areas frequented by large yellowfin tuna not associated with dolphin outside the 200-mile jurisdictions of ETP nations. U.S. and foreign vessels will cooperate in the research by donating ship time to conduct the FAD experiments while NMFS or IATTC observers are onboard to record the results of the experiments.

The second project involves the design of a prototype laser scanning device which can be attached to the ship's helicopter and used to locate schools of tuna not associated with dolphin.

The third project involves the design of a current meter which can be deployed by the vessel before making a set on dolphin to determine the status of currents under the net. A review of observer data indicates that subsurface currents are a major cause for the purse seine to malfunction during the backdown and retrieval procedures. For example, in 1989, five percent of the U.S. fleet's problem sets (those having dolphin mortalities of 15 or more animals) resulted in about 8,200 deaths or 65 percent of the fleets' total mortality. The successful development of a new current meter will allow the captain to decide whether to make a set on dolphin.

Enforcement Activities

Since January 1989, NOAA enforcement officers have reviewed the data collected on observer trips and interviewed returning observers. Of the 177 trips completed to date, investigations for 40 cases have been initiated for alleged MMPA violations occurring on 33 trips. The 40 cases include alleged violations in the following categories (range of penalties are included in parenthesis) : setting on pure schools of dolphin- 4 ($4,000 - $50,000); use of illegal explosives- 4 ($750 - $4,500); various gear and equipment infractions-14 ($1,200 - $2,250); sundown sets-12 ($5,000 - $25,000); hoisting or brailing live dolphin-1 ($3,100); and interference with observer duties-4 ($7,500 - $36,700). Assessments for these cases total $187,000; $9,250 has been received in settlements and 20 cases are scheduled for hearing in September 1990.

An agreement was concluded in 1989 with the IATTC that ensured NMFS access to data and observers assigned by the IATTC to U.S. tuna vessels that are used for enforcement purposes. This landmark agreement also provided the regulatory mechanism for foreign nations to have access to observer data for their tuna fleets necessary to enforce their marine mammal regulations.

Annual Performance Review

On December 12-13, 1989, the first annual meeting to assess the progress made to reduce dolphin mortality in the ETP by the U.S. and foreign nations was held in San Pedro, California. Seventy-four people attended the meeting, among them were U.S. and foreign government officials, congressional staff, and representatives from the National Academy of Sciences, Marine Mammal Commission, environmental organizations, and the U.S. and foreign tuna industry. Experts reviewed the status of dolphin population research, recent technological developments to reduce dolphin mortality, and the performance of the U.S. and foreign fleets. Available scientific information did not indicate that ETP dolphin stocks are in danger of extinction or depletion at this time. However, the group concluded that: 1) efforts should continue to reduce dolphin mortality to zero; 2) alternative fishing methods should be found that do not involve dolphin; and 3) foreign nations may require more time to meet U.S. import standards for yellowfin tuna, even though substantial progress has been made in reducing dolphin mortality.

This concludes my discussion of the U.S. program. I will now continue with a discussion of the status of implementing the foreign requirements contained in the 1988 amendments to the MMPA.

Foreign Fleet Requirements

On March 7, 1989, the 1988 MMPA standards for foreign harvesting nations were published in a rule governing the importation of yellowfin tuna into the United States. The rule requires nations to have a comparable regulatory program and to have dolphin mortality rates no more than two times the U.S. rate in 1989 and no more than 1.25 times in subsequent years.

The comparable regulatory program must include (1) marine mammal regulations which would set procedural requirements for the safe release of dolphin, and (2) an enforcement program. The comparable regulatory program must also impose a ban on sundown sets and a skipper performance system by January 1990. The number of eastern spinner and coastal spotted dolphin must not exceed 15 and two percent, respectively, of the nation's total mortality. The nation must participate in the IATTC's observer program and meet the required percent of annual observer coverage. Finally, nations must submit an annual report of their performance during the past year so that a finding can be made on whether the comparability standards have been met before a nation can continue exporting its yellowfin tuna to the United States. Embargoes would be imposed against yellowfin tuna from nations which fail to meet the standards; secondary embargoes may be imposed on all fish and fish products under the Pelly Amendment if the nation fails to meet the standard after six months.

Five nations with existing findings to import tuna to the U.S. were affected by the new rule: Ecuador, Mexico, Panama, Vanuatu, and Venezuela. El Salvador was embargoed for failure to comply with previous MMPA requirements and Spain was covered under Ecuador's finding.

For the most part, the tuna industries of these nations are keenly aware of the consequences of failing to meet the MMPA requirements but have had difficulty in getting their governments to recognize the requirements of the U.S. law. The continuing efforts of the IATTC Director and staff and U.S. tuna industry representatives have been instrumental in getting the foreign fleets to utilize dolphin saving gear and procedures in their fishing operations. The foreign fleets have accepted IATTC observers to monitor their operations and dolphin mortality. They have accepted the advice and expertise of the IATTC to improve their performance. The result of these efforts is reflected in a 32 percent reduction in the average dolphin mortality by the foreign fleet since 1986, even with an increase in mortality in 1989.

On March 14-16, 1989, a 17-member delegation of NOAA and U.S. tuna industry representatives participated in an international tuna-dolphin workshop in San Jose, Costa Rica to discuss the new MMPA requirements with the foreign harvesting and intermediary nations which have yellowfin tuna operations in the ETP. Eighty-three government and industry delegates from 14 nations attended the IATTC workshop co-sponsored by NOAA. While extremely frustrated with the United States for unilaterally imposing the new requirements, the delegates expressed a sincere concern about the need to reduce dolphin mortality.

At the workshop in Costa Rica, the delegates expressed concern about being able to: 1) achieve a dolphin mortality rate of 2 times the U.S. rate in 1989 when the U.S. has banned sundown sets since January and they are not required to ban sundown sets until 1990; 2) achieve the eastern spinner and coastal spotted dolphin requirements (15 and 2 percent, respectively, of the U.S. level) without real time data; and 3) establish 100 percent observer coverage in 1989 due to the logistics of locating and placing qualified observers as well as funding limitations.

In subsequent communications, we provided additional clarification to the nations about the requirements. We advised the nations that we would make assessments using the new dolphin mortality standard (i.e., twice the U.S. rate) for 1989, using any combination of consecutive years they selected, up to five years. The figures would be matched with a comparable time period for the U.S. fleet. We also advised the nations about the data agreement that was reached with the IATTC at their annual meeting on May 10-12, 1989. That agreement will assure access to observer data for enforcement purposes.

On May 10, 1989, NOAA announced its proposed determination to accept the IATTC observer coverage of 33 percent rather than require the 100 percent coverage currently required for the U.S. fleet. This determination was made on the basis that 33 percent coverage would provide "sufficiently reliable documentary evidence of the average rate of incidental taking by a harvesting nation." Although this decision was challenged in Earth Island Institute v. Moshbacher, a Federal Court found that the Secretary of Commerce had discretion to accept an observer program of less than 100 percent, although the court would examine whether that alternative level of coverage was factually supportable. After further review of the observer data by NMFS and IATTC scientists, we are prepared to continue to accept the 33 percent observer coverage for the 1990 season, but will require nations with fleets of fewer than 10 vessels to increase coverage to 50 percent to ensure statistical reliability of their dolphin mortality rates.

At this moment we are awaiting the annual reports due by July 31 from five harvesting nations which have marine mammal programs comparable to that of the United States. I can assure you after personal discussions with some of the nations involved that they take the embargo of the MMPA very seriously and have worked hard with their industry to meet the requirements.

Intermediary Nation Requirements

The requirements for intermediary nations were included in the tuna importation rule which became effective on March 7, 1989. The rule requires any nation exporting yellowfin tuna to the United States to identify the nation(s) harvesting the tuna being shipped to U.S. markets and to ban the entry of any yellowfin tuna from any nation which the United States embargoes or else it in turn will be embargoed. If an intermediary nation fails to ban tuna from nations embargoed by the United States after six months, it may be subject to Pelly Amendment sanctions the same as harvesting nations.

During April 1989, the required certificates and amended regulations were sent to 124 international exporters and the governments of 65 nations which are known to trade in yellowfin tuna. A monitoring program using government and non-government sources has been established to document the tuna trade in the event that sanctions against any of the 65 intermediary nations becomes necessary. The program includes trade in fresh, frozen, and canned tuna. The relationships and trade among the nations, however, are complex and the absence of any real time monitoring capability will make it difficult to take effective action against minor trading partners. I am aware that the amendment has received the attention of the major tuna trading nations like Japan and the European Economic Community who submitted strong objections to the requirements and sanctions in the import rule.

Summary of MMPA Implementation

In summary, regulations implementing the 1988 amendments for the U.S. tuna fleet are in place. The skipper performance system and the ban on sundown sets is responsible for the 36 percent or 7,000 animal reduction in mortality in 1989. The effets of the prohibition on the use of explosives are difficult to quantify.

According to the IATTC scientific staff, the 1988 amendments to the MMPA could result in a reduction in dolphin mortality of 30,000 to 50,000 animals annually, or 50 percent, by foreign harvesting nations fishing in the ETP. There is concern, however, about whether this can be achieved within the dates prescribed in the amendments. We certainly would expect a significant reduction in dolphin mortality after January 1990 when the ban on sundown sets, the use of explosives, and a skipper performance system became requirements.

With considerable assistance from the IATTC, concerned individuals in the U.S. tuna industry, Department of State staff, and my staff, the foreign harvesting nations were able to meet the import requirements for 1988. Meeting the requirements for 1989 will be more difficult because the "2 times rate" and percent limitations for eastern spinner and coastal spotted dolphin must be met. The data to make these determinations will not be available until the 1989 annual reports are submitted to us about July 31, 1990. However, in discussions with Mexico and Panama during the week of June 25, officials from these nations acknowledged that their fleets could have difficulty in meeting the standards. At this time we have not received any annual reports to substantiate their statements.

With the U.S. dolphin mortality rate down significantly in 1989 due in large part to the ban on sundown sets, we believe that it is going to be extremely difficult for the foreign nations to stay within two times the U.S. rate in 1989. It appears too close to call at this time.

Similarly, the ability of the foreign nations to meet the 15 and 2 percent limitations for eastern spinner and coastal spotted dolphin, respectively, by the end of 1989 is uncertain. Data for 1986-1988 submitted in the annual reports from the harvesting nations indicate that the percentages are attainable for some nations in some years and not in others. There is no real time monitoring in Latin America as there is in the United States so that the ability of the nations to meet this requirement must be based on "after the fact information."

In the final analysis, it appears the foreign nations understand the commitment of the U.S. to reduce dolphin mortality and are mounting a concerted effort in their countries to make a meaningful contribution to saving dolphin. The question is whether they can make their contribution within the schedule required in the amendments. The future effectiveness of the current dolphin conservation program in response to the MMPA amendments remains uncertain due in part to the unknown reaction by harvesting and intermediary nations to the voluntary "dolphin safe" program initiated by U.S. canners.

TUNA LABELLING ISSUES

Mr. Chairman, in addition to implementing the 1988 MMPA amendments designed to protect dolphin, we have been evaluating and responding to proposals that tuna be labelled with respect to whether it is "dolphin safe." The intent would be to give consumers some leverage in deciding whether tuna should be caught in association with dolphin. **S. 2044** is one bill that would seek to do this. To assist the Committee, I will review various aspects of tuna trade, review recent voluntary actions by the tuna industry and their impacts to date, and then comment directly on S. 2044.

Characteristics of Tuna Trade

In examining the potential effectiveness of trade sanctions (i.e. bans on improperly labelled products, embargoes, etc.) it is important to be able to trace the distribution of, in the case of the current legislative proposals, yellowfin tuna which has not been taken in association with dolphin from the point of harvest to the importer or exporter. To do this we must put the global production of tuna into perspective with the harvest of yellowfin tuna associated with dolphin and world markets which trade in tuna.

For the canned tuna market, the U.S. fishing industry landed over 226,000 thousand tons of tuna in 1989; and U.S. processors imported another 309,000 tons. Thus, the U.S. processing sector is heavily dependent on fish caught by foreign fishermen. U.S.

processors operate mainly in Puerto Rico and American Samoa, with a small amount of processing still done in Southern California. In addition, one-third of our tuna consumption is made up of tuna processed outside the U.S.

From the world-wide perspective, over 2.5 million tons of lightmeat tuna were harvested by all nations in 1989. The U.S. is second only to Japan in the size of its market for fresh and canned tuna--consuming about 725,000 tons in 1989 or about 30 percent of the world catch of tuna. Of the world canned tuna market, the U.S. consumes 49 percent of the total canned production, followed by western Europe - 34 percent, Japan - 7 percent, and other nations - 10 percent. Japan consumes primarily fresh tuna.

Yellowfin tuna is the premium lightmeat tuna species for canning because of its color and size. It commands a higher price than skipjack tuna. Both species are canned, often commingled in the same can. In 1988, about 65 percent of the world's yellowfin tuna catch of about 950,000 tons was caught in the Pacific Ocean, half of which was from the ETP. Of the ETP catch, approximately 70 percent, or 220,000 tons was caught in association with dolphin. Some 60 nations report catches of yellowfin tuna. The U.S. imports fresh/frozen and canned lightmeat tuna with yellowfin from 32 nations.

For a labelling requirement to be effective, U.S. canners and importers must presumably be able to produce evidence that an individual lot or shipment of canned tuna was not taken in association with dolphin. We are confident about the verification process for U.S. and foreign vessels on which observers have been placed by either the U.S. government or the Inter-American Tropical Tuna Commission (IATTC) in order to meet the requirements of the Marine Mammal Protection Act (MMPA). We are far less confident of the verification process for shipments of canned tuna involving the labyrinth of trade among the 30 to 60 intermediary nations without establishing an expensive and burdensome international monitoring and surveillance system. Since a majority of the tuna destined for canning within the United States is from foreign sources, the burden to verify the accuracy of how the tuna was caught would ultimately fall on U.S. tuna importers and processors, and in one way or another, be borne by the consumer.

The Industry's Voluntary Actions

On April 12, 1990, H.J. Heinz (StarKist Seafoods), Bumble Bee Seafoods, and Van Camp's Chicken of the Sea announced they would no longer purchase tuna caught in association with dolphin or any fish products taken in high seas drift nets. In addition, the canned tuna from these companies would contain a label indicating that they are "dolphin-safe". These companies purchase and can about 84 percent of all domestic and imported lightmeat tuna caught in the eastern tropical Pacific Ocean. The three smaller canneries process the remaining 16 percent of the U.S. supply, and have also pledged to follow the "dolphin safe" policy.

NMFS and several environmental groups endorsed this voluntary action as a means of reducing dolphin mortality.

The voluntary purchasing and labelling policy of U.S. processors has been in effect for only three months, and it is too soon to tell what effect it will have on the actions of U.S. and foreign fishermen. With respect to the U.S. fleet, vessel owners are predicting that some 15-17 larger seiners will try to move to the Western Pacific tuna fishery, and that the remaining smaller ones will be sold off or be tied up as catching smaller tuna not associated with dolphin in the eastern tropical Pacific is not economically viable. As of April 12, 1990, there were 35 U.S. seiners licensed to fish under the South Pacific Tuna Treaty which allows up to 50 licenses a year.

The impact of the new tuna policy on foreign nations catching and exporting lightmeat tuna to U.S. markets cannot be realistically evaluated yet. Currently five nations (Ecuador, Mexico, Panama, Vanuatu, Venezuela) are fishing tuna associated with dolphin and meet the requirements of the MMPA which allows U.S. importers to purchase their tuna. These nations caught nearly 300,000 tons of lightmeat tuna in the ETP in 1989; and according to preliminary information, killed between 60,000 and 80,000 dolphin. About 30 percent of the foreign caught tuna was purchased by U.S. firms. The importance of the U.S. market, however, varies by nation. In 1989, the percent of catch exported to the U.S. by each nation was: Ecuador -31%, Mexico - 11%, Panama - 31%, Vanuatu - 72%, and Venezuela - 48%. These nations are already endeavoring to meet under the MMPA requirements to have regulatory programs and dolphin mortality rates comparable to those of the U.S. or be embargoed. Another major concern is whether the European market will continue to purchase tuna caught in association with dolphin.

At the request of U.S. tuna canners, NMFS and the IATTC agreed to provide certificates or other documentation from observer records to confirm whether the tuna caught during a trip was intentionally taken in association with dolphin. Such confirmation posed no problem on U.S. tuna vessels where currently there is 100 percent observer coverage. The IATTC administers the international observer program to meet the MMPA requirements under which foreign nations currently maintain 33 percent to 50 percent observer coverage. Under the U.S. processors' voluntary certification procedure, only tuna from those trips having observers would have the opportunity to enter the U.S. market.

We have observed the following during the 100 days the industry's voluntary purchasing program has been in effect:

- Five "dolphin safe" certificates have been issued for U.S. trips since April 12, 1990 - no certificates have been issued for non-U.S. trips by the IATTC. Currently

11 of 14 U.S. vessels in the ETP are fishing on tuna associated with dolphin.

- Eighteen licenses to fish in the Western Pacific have been issued to 14 U.S. purse seine vessels from the ETP and 4 new vessels; 14 seiners remain at sea in the ETP, 4 vessels are in the process of being sold, and one is awaiting a license for the western Pacific. The U.S. fleet in the ETP could be fewer than 10 vessels by year end.

- Monitoring of tuna trade discloses that canners in Italy are purchasing large quantities of yellowfin tuna caught in association with dolphin from U.S. and non-U.S. vessels despite earlier reports that Italian canners had agreed to purchase only "dolphin safe" tuna.

It is too soon to evaluate fully how successful the voluntary effort will be. So far, a strong western European market and Italian purchases have resulted in continued fishing in the ETP for yellowfin tuna associated with dolphin by U.S. and foreign vessels.

Impacts on the Harvesting Sector

Today, there are 14 U.S. tuna purse seine vessels fishing in the ETP, down from about 125 in the mid-1970's. So far this year, about 4,200 dolphin have been killed by the U.S. fleet, which is approximately half the amount for the same period last year and down from about 370,000 dolphin in the mid-1970's. For over two decades the U.S. purse seine fleet dominated the ETP, catching over 70 percent of the harvest; today the catch is about 25 percent. The major decline in the U.S. fleet in the ETP is the result of the South Pacific Tuna Treaty which provides access to tuna stocks in the western Pacific Ocean. Thirty-five U.S.

vessels were licensed to fish in the treaty area until this year when all 50 licenses allowed were issued. The additional licenses were requested as a result of the voluntary "dolphin safe" purchasing policy.

The option of relocating to the western Pacific was available to the U.S. fleet because of the treaty. The conversion cost for the 18 additional vessels is estimated to be in excess of $10,000,000. This estimate includes the cost of a license and a technical assistance fee ($60,000 or $70,000) and the cost of a special purse seine net and other equipment which ranges from $250,000 to $1,000,000 per vessel.

As the vessels depart the ETP for the western Pacific, it is anticipated that some of the remaining vessels will be sold (4 vessels are currently for sale), further diminishing the presence of the U.S. fleet in the ETP. This is significant in that about 80 percent of the catch is yellowfin tuna and 20 percent skipjack; whereas in the western Pacific the catch ratio is reversed, giving the competitive edge for premium yellowfin to the vessels remaining in the ETP. Foreign vessels generally do not have the option to relocate in the western Pacific and historically have not fished outside the ETP.

Impacts on the Processing Sector

U.S. tuna processors received 433,000 tons of lightmeat tuna in 1989 having an overall estimated value of $2 billion. Half of the lightmeat tuna was domestically caught and the remainder from foreign suppliers. About 42 percent of the tuna was harvested by U.S. and foreign vessels in the ETP of which over 80 percent was delivered to canneries in Puerto Rico with the remaining 20 percent delivered to canneries in California and American Samoa.

In 1989, both U.S. production and imports of canned tuna rose dramatically. Total supply of canned tuna was over one billion pounds, a new record. Despite increased consumption, at year-end cannery inventories and retail inventories were higher than in years past.

Imports of canned tuna from Thailand, which made up 71 percent of all canned tuna imported in 1989, entered the country at some of the lowest prices for that product ever recorded, according to industry sources. Consequently, wholesale and retail prices for most packs have remained static or decreased slightly and discounts on branded light meat product have averaged around $12-$15 per case for the past year or longer. The average discounted price for a standard case of advertised brand, lightmeat tuna is about $28.

In the first six months of 1990 sales of canned tuna on the wholesale market have been slow. In addition, retail sales in some markets also have lagged. Some industry representatives attribute part of the slow down in retail sales to consumer confusion around the meaning of the words "dolphin-safe." Some consumers are simply waiting to buy "dolphin safe" tuna, and some of the slow down may be due to other market factors, such as, the price of other protein sources.

In response to slow wholesale and retail sales most canners have cut production and retail promotions are evident around the country. Two or three cans of light-meat chunk tuna selling for about $1 have been noted while ongoing sales at 59 or 69 cents per can have been reported on both the east and west coasts.

Of the five canneries in Puerto Rico, one is closed and for sale, one will close at the end of August for about four to six months to "observe market conditions" and one has slowed production. While economic conditions are cited as the principal reasons, the "dolphin-safe" initiative also appears to be a factor. Cannery work is important to the economy of Puerto Rico. About 7,600 jobs are provided annually. The closure of one plant and a "slow-down" in another affects about 2,000 jobs, or 25 percent of the local labor force.

Increases in sales and prices cannot be expected to occur before until, at least, the last quarter of this year. It is also reported that consideration is being given to a reduction in can size in lieu of price increases for "dolphin-safe" tuna.

Comments on S. 2044

S. 2044, similar to other legislation introduced in the House of Representatives, would require mandatory labelling of canned tuna to identify whether the tuna was caught in association with dolphin.

There may be merit to the idea that consumers should be able to find out whether products they purchase result in harm to the environment. There is no doubt in my mind that incentives should be provided to eliminate dolphin mortality. Nevertheless, the Administration opposes S. 2044. I think the bill represents misplaced good intentions. We are concerned that this approach might not significantly reduce dolphin mortality. A more likely result would be a setback in cooperative dolphin conservation, resulting in increased dolphin mortality. I am concerned that S.2044 would undermine progress made to date by the United States and other eastern tropical Pacific (ETP) nations to reduce marine mammal mortality in the yellowfin tuna fishery and that it would likely result in an increase the cost of tuna to consumers.

The only way to verify whether tuna to be canned was caught by technology (purse seines or driftnets) which kills dolphin would be to require very expensive and burdensome tracking and separation measures before canning. Since a majority of the tuna destined for canning within the United States is from foreign sources, the burden to verify the accuracy of how the tuna was caught would ultimately fall on U.S. tuna importers and processors.

Under the mandatory program contemplated by S. 2044, the costs to the government of insuring that the record keeping system is honest would be enormous in manpower and costs, with little expectation of being truly effective. Under a voluntary program, the Food and Drug Administration would be responsible to protect consumers by enforcing labelling that is not false or misleading. Requiring the Department of Commerce to duplicate this under a mandatory program would be expensive and wasteful.

Under this bill, a nation that is encouraged to reduce dolphin mortality under current MMPA measures in order to insure continued access to U.S. tuna markets would then be subjected to the labelling requirements regardless of their efforts. The effect, we believe, would be to jeopardize any cooperation we now receive to reduce dolphin mortalities. At the same time, it could increase incentives for foreign nations to develop non-U.S. markets for ETP-caught tuna, where labelling requirements do not exist. For example, Mexico developed a European market for its tuna after the United States imposed a tuna embargo in 1981 under the Magnuson Act. Today, the Italian market remains open to yellowfin tuna catches from all nations. Even the U.S. tuna industry currently markets yellowfin tuna in Italy and Asia.

Summary of Comments on S. 2044

Thus, Mr. Chairman, the Administration opposes S. 2044, as it is not clear that the bill would help conserve dolphins. In fact, it could make conservation more difficult if it results in undermining the other efforts we have taken under the 1988 MMPA amendments. The recent voluntary actions of the U.S. tuna industry need to be given a chance to take effect before deciding that a mandatory program is necessary.

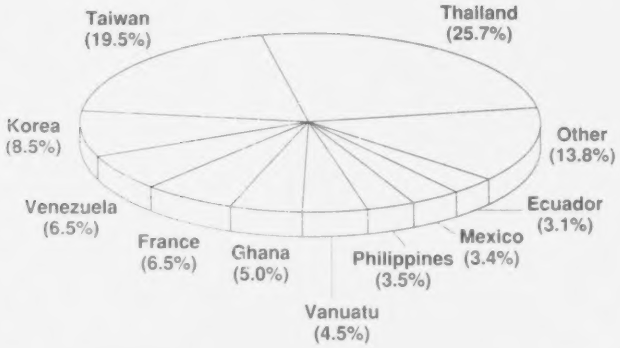
CONCLUSION

Mr. Chairman, both of the issues we examine here today revolve around the concerns of protecting one valued marine resource from harm caused by the harvest of another valuable marine resource. We believe that we have taken effective steps to implement the MMPA amendments, and the passage of tuna labelling legislation at this time is unnecessary and counterproductive. Nevertheless, it is important to continue our commitment to conserve dolphins.

I would suggest that we begin by examining an international dolphin conservation program as proposed at the 47th annual meeting of the IATTC on June 26-28, 1990 which includes considerations for 100 percent observer coverage, an international dolphin quota system, and cooperative research for alternative fishing methods. The IATTC is holding a special meeting scheduled for September in Costa Rica to agree on funding sources and other institutional arrangements necessary to implement such a program. If possible, I believe it would be desireable if we could send our IATTC Commissioners to the Costa Rica meeting after developing a carefully considered consensus regarding the requirements the United States would expect in the program. I look forward to consultations with appropriate House and Senate staff, environmental community and tuna industry representatives, and State Department staff to work out an agreeable position.

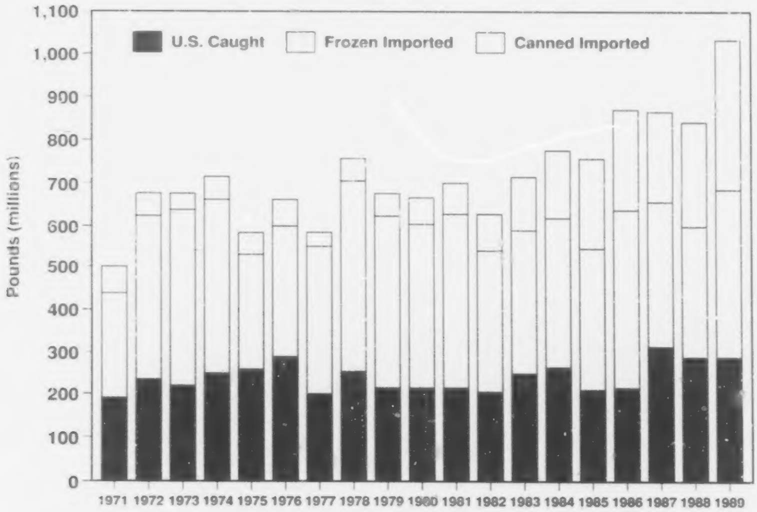
That concludes my testimony. I would be pleased to answer any questions you may have on this subject.

Total U.S. Imports for Canned Tuna Market
1989

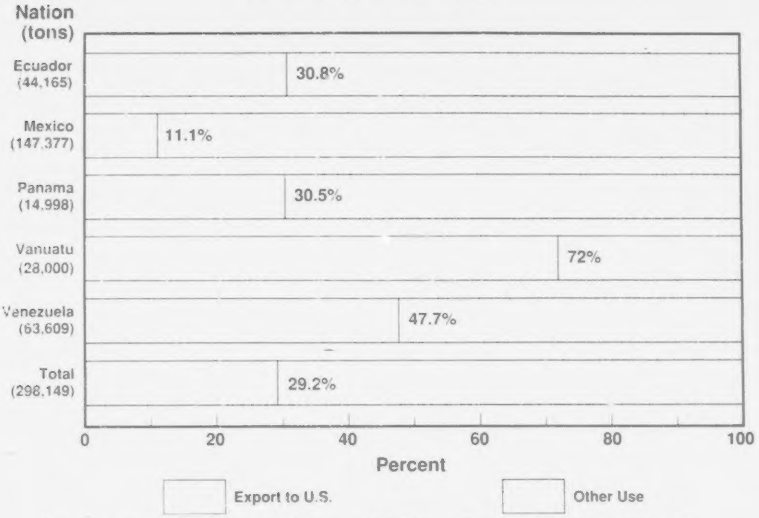


Source: NMFS (Includes light meat & white meat tuna)

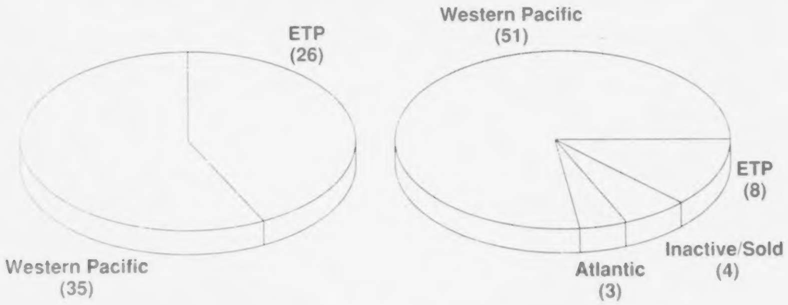
U.S. SUPPLY OF CANNED TUNA



Proportion of ETP Light Meat Tuna Catch Exported to the U.S. in 1989

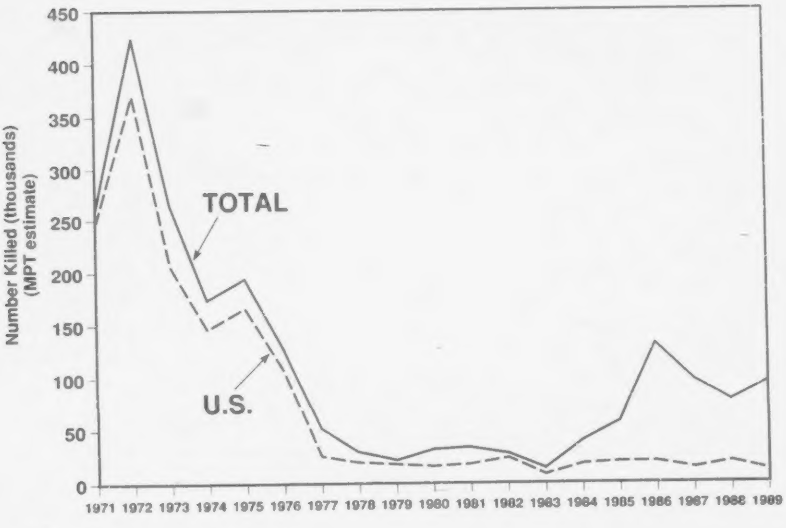


Projected Disposition of U.S. Purse Seine Fleet (>400 Tons)



January 1990 June 1990

INTERNATIONAL DOLPHIN MORTALITY



Senator KERRY. Dr. Fox, thank you very much, and thank you for doing that cogently as well as in an expedited fashion. I appreciate your summary. I think you have adequately put in front of the Committee your summary of the views.

Let me try to explore this a little bit with you.

You say that the principal problem we face today is the foreign fleet. Is that correct—in terms of the dolphin kill?

Dr. FOX. That's correct. The U.S. fleet today, I believe its kill is down to something like 4,794 dolphins.

Senator KERRY. That's 4,700? That's a new number. The last number I saw was 12,000.

Dr. FOX. That was for 1989. This is the kill so far in 1990.

Senator KERRY. So it's so far this year. Do we project that out for the rest of the year, then, that that would be about 9,000 to 10,000?

Dr. FOX. It will probably be less than a doubling. Mr. Fullerton, what would be your guess?

Mr. FULLERTON. I'd say someplace probably less than 8,000.

Senator KERRY. Thank you.

Now, no one disagrees that progress has been made, and no one disagrees that we have come a long distance from where we were in the 1970s, when people first began to cry out about this problem.

But the issue here is not one of finding a way to congratulate ourselves for making progress. The issue here is to achieve the goal of the Marine Mammal Protection Act, and the goal is zero, correct?

Dr. FOX. That's correct.

Senator KERRY. Or as near to zero as possible, I believe.

Dr. FOX. Yes—"approaching zero" I believe are the words in the act—"as low as possible approaching zero."

Senator KERRY. Now, before I get into the question of our fleet, what is the leverage that we have to reduce dolphin mortalities by foreign fishermen? When you say the thing that we have to focus on is the foreign fleet, how do we do that in the current framework?

Dr. FOX. The current leverage that we have is largely what the markets that we have for tuna in the United States are.

Senator KERRY. Correct. And the leverage is really to be able to turn to them in this market and say, "you're not complying with the standards that we set up. Therefore, we are going to place an embargo on your product". Correct?

Dr. FOX. That's correct. That's our current leverage.

Senator KERRY. And that leverage is about to be applied to Mexico and Venezuela, is that correct?

Dr. FOX. We are about to review it for five nations, and for each of those five, we will make a determination as to whether or not they meet the comparability of the kill rate provisions.

Senator KERRY. So you are looking for a market solution here, correct?

Dr. FOX. Congress has prescribed a market solution. It is our job to implement——

Senator KERRY. To implement the market resolution that Congress has prescribed.

Dr. FOX. Yes. That's right.

Senator. **Kerry**. And you would agree that, obviously, in its infinite wisdom, Congress has chosen the best method possible in order to do that?

Dr. Fox. I would say it has chosen the best method that we have.

Senator **Kerry**. Is there a better method? I'd love to hear it. Is there a better method to leverage these nations into compliance?

Dr. Fox. No, sir. I did not mean to suggest that.

Senator **Kerry**. If you assert that there is some better method out there, we ought to lay it on the table. I hope this is the best method possible.

Now, here you have companies that represent 49 percent of the American market, correct?

Dr. Fox. Yes, approximately 49 percent of the market is——

Senator **Kerry**. Excuse me. I mean 49 percent of the world market is the United States market. These companies represent 85 percent of the American market, but the full American market represents 49 percent of the world market, I believe.

Dr. Fox. For canned tuna, yes. In terms of total tuna product, I think the United States is roughly a third.

Senator **Kerry**. And Europe, the Continent, represents, I think, 34 percent of the world market.

Dr. Fox. Again, that's canned tuna. Yes.

Senator **Kerry**. Now how is it that if 83 percent of the world market is going to label their products—and we'll get to what the labeling means; I think Senator Breaux raises a legitimate issue, which is one of the reasons for this legislation—if these cans are labeled and the consumer is not going to buy it unless it is so labeled, haven't you provided the greatest leverage possible for these countries to adhere to the standard? Haven't you done, in effect, through this labeling precisely what Congress has held out as the leverage in the Marine Mammal Protection Act?

Dr. Fox. My view is that we need to maintain hope with these countries that the progress and the diligence that they apply to reducing the dolphin mortality will be recognized and they will not be locked out of potential markets. Our concern is if you go too far, you turn this hope and diligence into despair and rejection, and we have lost their participation perhaps in dolphin conservation programs.

Senator **Kerry**. Let me ask you about that.

If our fishermen, our fleet—as Congresswoman Boxer says—is down to seven boats now.

Dr. Fox. We have 14 that are currently fishing in the eastern tropical Pacific.

Senator **Kerry**. And seven of them are not supportive of this particular step?

Dr. Fox. We have 14 currently fishing; 11 of those have made sets on dolphins at this time.

Senator **Kerry**. Now, if our boats are required to have 100 percent coverage by observers, why shouldn't our markets shouldn't look askance at boats that are at 33 percent coverage by observers? In other words, why shouldn't foreign boat owners—if they want access to our market, if they want to make money off us, if they want to sell to the United States and we are their biggest market—be willing to do what our boats are doing, which is to put an observer on each vessel? If they are sincere in their efforts to not kill dolphin, why would they object to having 100 percent observer coverage?

Dr. Fox. With regard to observer coverage, specifically, we are looking at probably increasing our requirement for foreign vessels from 33 percent, which is the present rate for 1990, to a much higher rate.

Senator Kerry. My question to you is doesn't this labeling process require it? Does it not make it automatic?

Dr. Fox. The bill will require it, as I understand it. Yes.

Senator Kerry. What's wrong with that? Why aren't you jumping up and down and saying that's terrific, that's exactly what we want and need?

Dr. Fox. I would say that we do need very high observer coverage, approaching 100 percent. It may not be necessary to have absolutely every single boat on every single trip. But certainly it ought to be at a very high number.

I have testified before on that for the U.S. fleet and I believe that for the foreign fleet as well.

Senator Kerry. And if there were that kind of coverage on the foreign fleet, would you then not have an ability to track, from ocean to plate, in a sense, whether or not a particular catch was, in fact, dolphin free or not?

Dr. Fox. We would have for those nations fishing the eastern tropical Pacific with the purse seine method. As was pointed out, tuna are caught with drift gillnets throughout the north Pacific. There is a wide variety of countries that use other techniques that take dolphins as well.

Senator Kerry. Let me come to that issue. The Chairman of this Committee, Senator Hollings, and I, together with Senator Stevens, have been screaming about driftnets for years. We have been seeking an outright ban on them.

We took the issue to the United Nations last year. Again, to their credit, StarKist is saying if a catch is fished with a driftnet, it does not get a "dolphin safe" label.

So it seems to me the market has a way of screaming out loudly and clearly that is not being taken into account. I mean, why not add any of the dolphin-taking methods and say that, if tuna is going to be caught that way, this label has a right to be put on that particular product?

Won't the market then do what we don't need a huge bureaucracy and all kinds of administrative offices to do? Isn't that exactly the doctrine we have been fed for the last 12 years—privatization?

Dr. Fox. Well, it is our view that the market is doing exactly that, and there is not the need, then, for the government to intervene with requiring labeling and setting up of bureaucracy to follow all these tuna around to determine compliance with that regulation.

Senator Kerry. But doesn't that then raise another issue? I mean, we are seeing all kinds of ecologically safe products which aren't ecologically safe at all. I mean, everybody puts a "green stamp" on a product. It is not as though there are standards for these things.

Doesn't the government have a responsibility to guarantee that there is uniformity in the standard applied by which we are making a judgment as to whether tuna really is dolphin free? It is all a question of fair trade practices, really, and deceptive advertising.

Don't we really have to establish some governmental duty so that, if there is a breach of standards, we have a right to sanction that breach of standards?

Dr. Fox. I agree with your thesis, Senator Kerry. I am not an expert in labeling. There is an agency that has the responsibility for labeling, labeling fraud, and accuracy in labeling. That is the Food and Drug Administration. I believe that it may be beneficial for this Committee to hear from the experts in labeling as to how they might control improper labeling.

Senator Kerry. Let me ask you this question.

In your judgment as an expert and as somebody who has been involved in this issue, do the foreign fleets have realistic alternatives to the U.S. market and European market?

Dr. Fox. Realistic alternatives to the U.S. and European markets?

Senator Kerry. Yes.

Dr. Fox. There is a market in Japan. I believe Mexico sells its tuna to the United States 11 percent in 1989, with a large share to Italy and the rest of it to Japan.

Senator Kerry. Let me underscore that I am not asking you if there is a market. I am asking if it is a realistic alternative to the U.S. market. That is a very different question.

Wouldn't they suffer tremendous attrition in their fleet if they lost the U.S. market? Wouldn't their companies lose huge sums of money?

Dr. Fox. No. If you take Mexico as an example, they only export 11 percent of their tuna to the United States. Therefore, they have large markets elsewhere.

They are convinced that this is a serious problem and they are preparing to utilize more tuna in their own domestic market.

Senator Kerry. But Mexico is at 11 percent, currently, I believe, because of a restriction on them. Isn't that so? Mexico desperately is trying to get back into our market, aren't they?

Dr. Fox. No. There is no restriction.

Senator Kerry. I was under the impression that they were trying to reenter our market.

Dr. Fox. At one time there was an embargo, yes. But that was lifted a number of years ago.

Senator Kerry. It was lifted. But aren't they trying to get back into our market now?

I mean, the embargo was lifted, but different channels of supply were set up so that they were not automatically back into the market. In other words, during the time the embargo existed, people turned elsewhere for their supply, which effectively shut Mexico out beyond the embargo time, and now they are trying to get back into it because loss of our market has hurt them.

Dr. Fox. Well, I am sure that they would like to improve their performance in the U.S. market. But whether or not it is fatal to them, I cannot determine. They indicate no.

Senator KERRY. We are going to run into time problems here with the ensuing proceeding. So let me turn to Senator Breaux and then come back.

Senator BREAUX. Thank you, Mr. Chairman. I thank the witnesses for their statement.

I see two reasons why the administration opposes the tuna labeling legislation. The first is clearly that it would undermine the progress that has been made so far by the United States with other nations in our efforts to reduce dolphin mortality, and would result in an increase in cost to consumers.

You also talk about how difficult it would be to track where the tuna came from and whether it was in compliance with the regulations or not.

As I said earlier, I think our decisions in this area should not be based on emotion. They should be based on science.

I think that is what the Congress should be asked to do and that is what we should do.

I have two concerns with the legislation. The first is enforcement. The second is whether the bill is good policy from a scientific standpoint.

Let me ask you about the second point first.

I take it that you do not consider the legislation that is before the Committee to be good policy to reduce dolphin mortality, based on current scientific knowledge. If that is correct, would you elaborate on why.

Dr. FOX. That is generally correct. We believe that, with the United States fleet largely leaving the eastern tropical Pacific, that reduction in competition will engender greater fishing by other nations. The United States clearly has the lowest dolphin mortality rate for any country fishing anywhere in the world. Therefore, with that sort of loss of competition and expansion of other fleets that have a higher mortality rate, we believe that, at least in the short-term, the dolphin mortality will increase. Therefore, we are very concerned about that.

I am very concerned about the potential effect of an embargo having the effect of a country dropping out of the IATTC program, dropping out of the observer program, dropping out of the technology transfer program, and basically saying forget the U.S. market, we have to look elsewhere, and fishing as inexpensively as it can and, in terms of conservation, as "dirty" as it can, to catch tuna as cheaply as it can, to compete in that market. We are very concerned about that in the short-term.

So, looking at the dynamics of the situation, as we understand it, that is one of our major concerns about this legislation, that it adds a burden beyond the burden that we think already may cause that problem.

Senator BREAUX. Let me ask you a question on enforcement.

You point out that you are not confident of the verification process for shipments of canned tuna in the labyrinth of trade among the 30 to 60 intermediary nations. I assume you are talking about that tuna is traded, caught, processed, canned, and shipped in packages among 30 to 60 nations before it may reach its final destination.

Quite frankly, I do not think that there is a way that anyone can enforce a process to ensure that when a can is labeled "dolphin safe" it accurately reflects the contents of the can unless the tuna is coming from a U.S. vessel.

Would you elaborate on the concern that you highlighted in your statement?

Dr. Fox. We think, in order for something like this to be enforceable, that it has to be a fairly short chain, like the U.S. fleet delivering to the United States; like a country that traditionally fishes the eastern tropical Pacific to have IATTC observers on it, or certify that that landing comes to the United States almost directly. That is a relatively small percentage of the tuna that is traded worldwide. Therefore, we look upon it as an enormous effort to try to determine whether or not the law is actually being complied with. It would be very, very costly for us to do a good job of enforcing that kind of law.

Senator Kerry. Would you yield for a minute?

Do you have any estimate of the cost? Have you done any analysis?

Dr. Fox. We have not really fully analyzed it. We have, in all honesty, taken a close look at what would be a minimal activity, and it is something like ten man-years of effort. That would be minimal compliance and not what I would consider to be a program that would insure that the tuna were dolphin safe. Far larger than that.

Senator Breaux. I remember when we battled on this issue starting back, at least when I started, in 1972. We were taking 400,000 dolphin a year. It was an awful time, as far as legislation was concerned, to reach the compromise which resulted in the passage and adoption of the Marine Mammal Protection Act. I think the Act has worked extremely well because of the effort of an awful lot of people, both in government and in the industry.

A lot of our decisions were made on a scientific basis, based on the condition of the marine mammal stocks. I have a two part question concerning the future of tuna and dolphin populations.

Number one, is it a correct concern that, if you do not catch tuna by setting on dolphins but rather set directly on schools of tuna, that there is an increased risk of catching young and less mature tuna, thereby, damaging or potential damaging future tuna stock conditions.

Dr. Fox. Let me say by way of qualification that in my early scientific training and career, I worked on tuna, tuna population dynamics, and biology. I have not specifically looked at the question and the data that relate to your question. But those who are world renowned experts in the biology and productivity of tuna have, and that is the scientific staff of the Inter-American Tropical Tuna Commission. Their conclusion is if tuna fishing were to be diverted strictly to the young, immature, yellowfin tuna, that the productivity of that population would drop from some 300,000 tons down to 200,000 tons. So you would lose about a third of its productivity by that activity. And it would require much greater controls on the fleets fishing in that area in order to prevent a complete depletion or over-fishing of the population to the point where you would get even greater losses in yield.

Senator **Breaux**. The second point of the question deals with conditions of the dolphin/porpoise stock as we know it. We have taken a lot of steps in Congress to protect threatened and endangered species. You know of the conflicts we have had over the sea turtle problem, and I can cite to you a number of other examples of species that are threatened or are even on endangered lists. What can you tell this Committee about the condition of the current dolphin and porpoise stocks?

Dr. Fox. Well, the dolphin stocks have diminished through the fishing on them since the middle 1960s, in some cases substantially—the eastern spinner and coastal spotted dolphins in particular. However, our ability to detect any problems in that area has not yielded anything that we would be concerned about from the standpoint of viability, long-term viability, of those populations at present.

Senator **Breaux**. You said something in your statement about it. Do you remember where you said it? I thought it was a little different from that.

Dr. Fox. Well, Senator, it is about a 30 page statement. Let me look.

[Pause.]

Senator **Breaux**. As I remember glancing through it, you mention a study by perhaps the Southwest Labs?

Dr. Fox. Yes.

We have a six year study that is ongoing that was mandated by Congress, to keep track of the dolphin populations and try to determine whether they are going up or down.

Senator **Breaux**. Here it is, on page 6 of your statement: "A report prepared by our Southwest Fisheries Center following the third survey completed in 1989, indicated that estimates of relative abundance for all stocks of spotted and spinner dolphin were substantially higher than the 1988 estimates."

Is that correct?

Dr. Fox. Yes.

Senator **Breaux**. And what are your trend analyses showing on dolphin stocks?

Dr. Fox. That we can't detect any downward trend on the dolphins at this point.

Senator **Breaux**. Gentlemen, I thank you very much. I thank you all for being here and for your presentations.

Senator **Kerry**. Thank you, Senator Breaux.

Let me say to you that I share Senator Breaux's concern and the concern expressed in the testimony about the lure of the western Pacific for those U.S. Fishermen looking for a quick and easy way to avoid current technology requirements that are necessary in the ETP to prevent dolphin catches. I suspect that the migration to the western Pacific would be likely to open up the ETP to foreign vessels who wanted to come and prey on it.

But the problem is that, whether you like it or not, whether it is your preferred approach or not, there already is in place, as a matter of corporate policy, a new approach to tuna labeling. The market is way ahead of you and way ahead of us in Congress, incidentally.

It is being said that if foreign fishermen can come into the eastern tropical Pacific when our fleet goes out to the west because they don't fear the market leverage that we would apply as a result of the MMPA, then the MMPA does not do the job of dolphin protection adequately. And, in effect, American consumers, StarKist and subsequently, Chicken of the Sea and Bumble Bee, have come to that conclusion way ahead of us.

Now, as a matter of corporate policy, I think the real issue is how Congress can make this reality work, because it is the reality.

I am absolutely convinced that the American consumer will remain sensitive and become more sensitive to this issue, and I am absolutely convinced that, because 85 percent of the American market has adopted this standard, you are not going to see fishermen trying to sell stuff here who would be violating the MMPA.

So you are either going to have them looking for a new market or they are going to adhere to this standard. And the real issue that I think you need to look at—and I don't have the answer; it certainly needs to be explored and we will have to work at this—is how we can maintain leverage over these other countries to get them to comply with this new standard without placing our fishermen at a disadvantage.

Now, maybe the National Academy of Science study that we have requested with respect to new fishing technologies will help resolve this issue of the eastern tropical Pacific, and something will come up that will provide a means of fishing so they don't have to abandon this area and they can still do dolphin safe fishing. I don't know.

I gather you are prepared to evaluate whatever proposals come out of the NAS study.

Dr. Fox. Yes.

Senator Kerry. But it seems to me that you are dancing around this new reality, which is that the decision has already been made. It is not up to us whether or not we have a standard. It is up to us whether or not there is a standard that is uniform and enforceable.

Senator Breaux. Would the Chairman yield on that point?

Senator Kerry. Absolutely.

Senator Breaux. I would think that the difference is that the market is in the business of advertising. The government should be in the business of making decisions on the basis of science, not on the basis of what sells a product. That is why I think you have a difference between companies who have made a decision based on what sells more tuna rather than a decision made on science. These gentlemen from the administration are faced with making a decision on what scientifically can work. That is why there is a difference.

Senator Kerry. Well, I don't disagree with that. But my question is whether or not the science be brought into sync with the corporate policy here. That is what I am really getting at. I think that, hopefully, they can be, and I think that is what we should attempt to achieve, so that we resolve the eastern tropical Pacific dolphin problem while simultaneously establishing a standard that makes sense and is applied.

That is the goal of legislating, if we can do that intelligently.

But I share the concern. I think if you don't have that standard, you could have fishermen simply decide the hell with that 85 percent of the market, we don't care about it. We're going for the 15 percent, and since others are abandoning the eastern tropical area, we are going to go in there and fish any way we like. The question is are there enough boats and are there enough people to do more damage than they are doing anyway under the current system. That is a legitimate question.

I appreciate your testimony today, particularly the length and breadth of your written testimony, which is very helpful to us.

Thank you both very, very much. We appreciate it.

Dr. Fox. Thank you, Mr. Chairman.

Senator **Kerry**. I would ask the next panel to come to the witness table. I call Mr. Keith Hauge, President and Chief Executive Officer of StarKist Seafood Company; Ms. Patti Davis, representing the Earth Island Institute; and Mr. Manuel Silva, the owner of the fishing vessel TRADITION and Chairman of the Board of Directors of the U.S. Tuna Foundation.

Thank you very much, each of you, first of all for coming. I know that two of you have travelled a significant distance to be here. For all of you it is an effort to be here and we appreciate it enormously.

What I would like to do is ask if you could summarize your prepared testimony briefly. But I understand if you cannot do so completely. I know you have waited a long time to testify.

I think we will begin with Ms. Davis. Then I would ask, Mr. Hauge, if you would follow, and, finally, Mr. Silva.

Thank you.

STATEMENT OF PATTI DAVIS, EARTH ISLAND INSTITUTE, SAN FRANCISCO, CA; ACCOMPANIED BY JOHN M. FITZGERALD, COUNSEL FOR WILDLIFE POLICY, DEFENDERS OF WILDLIFE AND CHAIRMAN OF THE DOLPHIN COALITION

Ms. **Davis**. Thank you, Senator Kerry, for allowing me to testify. John Fitzgerald, from the Dolphin Coalition, is beside me.

This labeling bill is the least we can do to address a situation that has been going on for almost 30 years, since purse-seining began in the 1960s. If we were going to come down on the side of humanity and conscience, we would be here today talking about the United States being dolphin safe.

StarKist responded to the will of the American people and made an environmentally responsible, humane decision to change their policy regarding the purchase of tuna caught by setting nets on dolphins. I have to wonder why we, as a country, cannot follow their example and be the first nation to close its borders to dolphin-tainted tuna.

If we are not willing to do this, it seems only reasonable that the American people be informed that the slaughter of dolphins is continuing and that they be allowed as consumers to either sanction the slaughter or condemn it by their choice of which product to buy.

It is appalling to me that we are now 18 years past the passage of the Marine Mammal Protection Act, which clearly stated as its goal bringing dolphin mortality down to insignificant levels approaching zero. We are still taking small measures, rather than ones designed to honor the intent of that act.

We seem to have adopted an attitude that killing one of the most intelligent, sentient species on earth is acceptable because there is a food source swimming underneath. This has resulted in the largest slaughter of marine mammals in history.

During the Reagan Administration, implementation of the Marine Mammal Protection Act was stalled at 20,500 dolphins per year. That is 20,500 too many. All the environmental community has asked for in these 18 years is parity under the law.

It is illegal for any U.S. citizen to harm or harass a dolphin; yet tuna fishermen are exempt from this law.

I suppose I should be inured to hearing the tuna industry talk about dolphins in terms of sheer numbers, congratulating themselves on bringing the numbers down from over 100,000 to 20,000, as though they are not talking about highly intelligent marine mammals, who nurse and nurture their young, who have been known on thousands of occasions to save human lives. But I am not inured to this. I continue to find it a horrifying example of our arrogance toward other species.

The tuna industry admits to a death toll of 6 million dolphins over the past two decades. This figure would be horrifying enough if it were accurate. Unfortunately, we can easily double the figure.

The reality is that dolphins who have been ensnared in a purse seine net, who have been terrified and, until recently, deafened by explosives, who have in all likelihood ripped off beaks and flippers in their frantic efforts to free themselves, will not be counted as dead if they show even a flicker of life when they are thrown back into the water. Females spontaneously abort or stop lactating; babies are left motherless; and the remaining members of what was once a strongly bonded herd are easy prey for the sharks that start gathering as soon as the first blood is spilled.

What makes this labeling bill particularly crucial at this time is StarKist's recent change of policy. The risk is that people will assume all canned tuna is dolphin safe, which is not the case. Bumble Bee, which originally followed StarKist's announcement with a similar pledge, has now said they will honor their contracts through October. Other, smaller companies, have said nothing.

Dolphins are still dying. Of the 15 boats now operating in the ETP, 11 have already reported dolphin mortalities.

The tuna industry has consistently fought every effort to save dolphins. In 1980, because of pressure from the tuna lobby, a National Marine Fisheries Service prohibition against sundown sets, in which the kill rate is four times as high, was dropped after being in effect for only eight days.

In 1981, the ATA sued to keep NMFS observers off U.S. boats and won an injunction which kept them off until 1984, when it was overturned.

In 1986, pressure from the tuna lobby, coupled with the antiregulatory stance of the Reagan Administration, weakened regulations concerning dolphin protection techniques, resulting in such a high death toll that for the last three months of 1986, tuna boats were prohibited from setting nets on dolphins.

It should be mentioned that there was no impact on the amount of tuna caught without purse seining on dolphins during those months.

The Environmental Investigation Agency, based in England, just released a report estimating that 500,000 dolphins were being killed worldwide annually, and at this rate many, if not all, species could become extinct in our lifetime. The eastern spinner has been classified as depleted for several years.

It will be one of our saddest legacies, the death of the dolphins, and we will have to explain to our children how we let them die. We will have to answer them when they ask with the clarity of innocence why we didn't do something to save them. We may answer that we were told there was a better way to fish and that only a few dolphins were dying. But our children will respond with silence, as wide and unforgiving as the silence of the sea, because they will know that profit and convenience are not valid reasons for this slaughter.

I have one more comment written down in my statement, but I would like to say something else instead, if you will forgive my improvising.

I think this is particularly timely right now because there is a very strong demand in this country for being accurately informed about what is in our food, how our food came to be put on the grocery store shelves. People do not want alar on their apples; they do not want dolphins being killed to catch tuna; they don't want the rain forests being slashed and burned so that Burger King can get some cheap grazing land for their cattle for two or three years. And they are tired of being informed of these environmental catastrophes ten or even 20 years down the line.

We pride ourselves on being a country that is based on openness and freedom of information and accessibility of information. If the United States Government is going to sanction an atrocity like the killing of dolphins—and it is nothing short of an atrocity—then at least be honest about it.

Thank you.

[The statement follows:]

TESTIMONY OF JOHN M. FITZGERALD
COUNSEL FOR WILDLIFE POLICY, DEFENDERS OF WILDLIFE,
AND CHAIRMAN OF THE DOLPHIN COALITION
ON S.2044
DOLPHIN PROTECTION AND CONSUMER INFORMATION ACT

BEFORE THE SUBCOMMITTEE ON
NATIONAL OCEAN POLICY STUDY
SENATE COMMERCE, SCIENCE AND TRANSPORTATION COMMITTEE
JULY 25, 1990

ON BEHALF OF THE DOLPHIN COALITION:

AMERICAN CETACEAN SOCIETY
AMERICAN HUMANE ASSOCIATION
AMERICAN OCEANS CAMPAIGN
ANIMAL PROTECTION INSTITUTE
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS
CALIFORNIA LEAGUE OF CONSERVATION VOTERS
CALIFORNIA MARINE MAMMAL CENTER
CENTER FOR ENVIRONMENT, COMMERCE AND ENERGY
CENTER FOR MARINE CONSERVATION
CETACEAN AWARENESS PROGRAM
CETACEAN SOCIETY INTERNATIONAL
DEFENDERS OF WILDLIFE
DOLPHIN PROJECT INC.
EARTH ISLAND INSTITUTE
ENVIRONMENTAL DEFENSE FUND
ENVIRONMENTAL INVESTIGATION AGENCY USA
ENVIRONMENTAL POLICY INSTITUTE/FRIENDS OF THE EARTH/
OCEANIC SOCIETY
ENVIRONMENTAL SOLUTIONS INTERNATIONAL
FRIENDS OF ANIMALS
FUND FOR ANIMALS
GULF COAST FISHERMEN'S ENVIRONMENTAL DEFENSE FUND
THE HUMANE SOCIETY OF THE UNITED STATES
INTERNATIONAL FUND FOR ANIMAL WELFARE
INTERNATIONAL WILDLIFE COALITION
MARINE MAMMAL FUND
NATIONAL ALLIANCE FOR ANIMAL LEGISLATION
NATIONAL AUDUBON SOCIETY
NATURAL RESOURCES DEFENSE COUNCIL
OCEAN ALLIANCE
PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS
PLANNING AND CONSERVATION LEAGUE
SEA SHEPHERD CONSERVATION SOCIETY
SIERRA CLUB
SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION
TEXAS ENVIRONMENTAL COALITION
WORLD SOCIETY FOR THE PROTECTION OF ANIMALS
AND ON BEHALF OF GREENPEACE,
WASHINGTON HUMANE SOCIETY AND
MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

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Mr. Chairman, I am John M. Fitzgerald, Counsel for Wildlife Policy for Defenders of Wildlife and Chairman of the Dolphin Coalition. I am testifying today on behalf of the Dolphin Coalition, which is composed of 37 organizations, and on behalf of Greenpeace, the Massachusetts Society for the Prevention of Cruelty to Animals, and the Washington Humane Society. Together these organizations have well over eight million members.

Although all of the Coalition members and Greenpeace participated in the preparation of this testimony, I would like to acknowledge the assistance of these people in particular: Christopher Croft, Director of the Dolphin Coalition; Dave Phillips, Director of Earth Island Institute; Karen Guz, Entanglement Fellow of Defenders of Wildlife; Gerry Leape and Traci Romine of Greenpeace; and Harry Upton and Nina Young of the Center for Marine Conservation. We appreciate the opportunity to testify.

Overview

For thirty years, since the United States first developed the purse seine net technology, dolphin mortality associated with tuna fishing operations in the Eastern Tropical Pacific (ETP) has been a matter of concern. The practice of targeting and encircling dolphins with purse seine nets to catch large yellowfin tuna has resulted in the death of unacceptably high numbers of marine mammals and may have seriously jeopardized the populations of several dolphin species, including the Eastern Spinner dolphin. Prior to the use of purse seine net technology, fishing fleets were aware of the mysterious bond between dolphins and the large yellowfin that swim beneath. Fishermen would seek out herds of dolphin and chum the waters with bait. As the dolphin fed, long fishing lines would be dropped between the dolphin to snag the yellowfin below. This fishing method effectively caught yellowfin while concurrently rewarding dolphins with bait. This symbiotic relationship between dolphins and fishermen changed dramatically with the development and implementation of purse seine net technology in 1959. Since then, more than six million dolphins have died in this fishery, ranking it as the number one marine mammal killer in the world today. In 1989 alone, more than 113,000 dolphins died in purse seine nets in the Eastern Tropical Pacific.

In December of 1972, thanks to the leadership of Congressman John Dingell, then Chairman of the Merchant Marine and Fisheries Subcommittee On Fisheries and Wildlife Conservation, the Marine Mammal Protection Act (MMPA) became law. The MMPA is a milestone in wildlife legislation that set the standard in several ways for more than just the United States and the protection of marine mammals, and it did lead to a reduction in dolphin deaths.

Nearly twenty years following the passage of the MMPA, however, as many as 100,000 dolphins have been killed annually in recent years in the Eastern Tropical Pacific (ETP). This slaughter was in large part conducted in compliance with the MMPA, as amended in the 1980's. Although the original intent of the MMPA was to bring the kill and serious injury rate to "insignificant levels approaching zero," the slaughter of dolphins has continued at very significant levels. And we continue to recommend as we did in 1988, that the dolphin kill quota be reduced by the end of 1992 to zero. It is certainly higher than the achievable rate even for setting on dolphin, given that the quota was originally established when the fleet was roughly 94 boats and it is now about 15. Since then, further restrictions and different techniques reduce the kill rate per boat and per set as well. What we suggested be done in four years, the U.S. market has demanded in less than four months.

Therefore, Congress should reject any suggestion that labels indicate simply whether the tuna was taken in a manner that complies with the MMPA as suggested by some members of the tuna fleet.

A recent poll conducted by the Michael Peters Group found that nearly 90% of Americans are concerned about the environmental impact of the products they purchase. The tuna-labeling bill provides consumers with assurances of dolphin-safe claims, so that they can reliably make a purchase choice on that basis. Because so much dolphin-safe tuna is available, this need not result in either a loss of jobs or a shortage of tuna. We applaud the recent move to dolphin-safe tuna by numerous corporations and look forward to the time when that transition is complete.

Existing trade and labeling laws are not sufficient to ensure fully informed and verifiable consumer choice. These laws generally provide no private right of action, they require more standards, specific to the industry, than are currently in place, and of the sort of documentation that is not available in the situation where the crucial facts are available only to a few, such observers on board the vessel. Thus a labeling requirement alone, as suggested in H.R. 2948, even coupled with a private cause of action, would probably not be sufficient to provide full assurance to all affected parties. Compliance with any new federal tuna labeling standards should be minimum standards, however, and not shield persons from such other standards as may exist in law.

Another major point is that this legislation, as reported by the Fish and Wildlife Subcommittee and the full Merchant Marine Committee does contain the most effective sanction yet available against high seas driftnetting. While the Administration has not implemented a general ban on driftnetted fish that would seem to be required under the general terms of Section 1371 of the MMPA, H.R. 2926 as amended would make that requirement quite specific with regard to driftnetted tuna fish.

We share with Rep. Bates his concern that the U.S. fleet be given assistance in making the transition to fully dolphin safe methods and support the concept of providing loans for research, relocation and conversion.

As we have recommended before, we believe the Congress should, on certain conditions discussed below, temporarily suspend the embargo that is about to be imposed on foreign tuna to the extent that the tuna is certified dolphin-safe under the provisions of the enacted Boxer-Biden legislation.

To encourage foreign compliance, creative means of funding observers are needed. For example, the Fish and Wildlife Foundation or a similar mechanism could receive or be empowered to receive contributions toward the cost of foreign fleet observers.

Through passage of the Boxer-Biden bill (as I will refer to H.R. 2926 and S. 2044 in most cases) Congress can help bring an end to that slaughter and meet that constituent and consumer demand by making it possible for consumers to choose with confidence and to avoid paying for death of dolphins. The six largest tuna marketing firms in the U.S. are now calling for this legislation to be enacted as soon as possible.

TESTIMONY IN FULL

The Need for Tuna Labeling Legislation

We congratulate those corporations which have announced that they would no longer market or purchase tuna that was caught at the expense of dolphins. H.J. Heinz (Starkist), Bumblebee, and Van Camp (Chicken of the Sea) and the three firms which occupy fourth, fifth and sixth place in market share have all announced different dolphin-safe policies. They have responded in a positive and forthright manner to the consumer demand that has been documented in recent years by Dr. Stephen Kellert of Yale University's School of Forestry and Environmental Studies. (See attached letter to Mr. Christopher Croft in Appendices.)

The most important point to be made at this hearing is that the promise of the corporations to sell what they perceive to be tuna that is dolphin-safe is only a first step. The second step and a step that is necessary to the fulfillment of that promise is the step Congress must take: to establish a system with common standards understood by all, shared by all, and subscribed to by all that provide the consumer with the right to know and the right to know for sure. The dolphin-safe standards currently set by the tuna companies are not uniform, do not have built-in verification systems, and are subject to corporate policy change at any time. A side-by-side chart appended to our testimony shows the large difference in the details of the standards adopted even by those companies that have announced a "dolphin safe" policy according to company responses provided to the Center for Marine Conservation. [Appendix F]

Currently we are without a verifiable system for ensuring that dolphin-unsafe tuna does not end up in a can with a dolphin-safe label. We must establish a system that guarantees the tuna industry's promise is not undercut by either intentional or mistaken misrepresentation and mislabeling. Without the Boxer-Biden bill, those companies attempting in good faith to provide dolphin-safe tuna risk being undercut by less scrupulous operators.

Already articles have appeared in the newspapers questioning the reliability of numerous green label claims (see Appendices).

The decision for Congress is whether to support the companies which have taken these positive steps--whether we will back them up with the power of law, setting enforceable standards for tuna labels. Verification process and enforcement procedures are necessary to ensure that a labeling approach works. We must have a certification process from ship to shelf to ensure that a given tuna product is entirely dolphin-safe, not merely a percentage of the catch and therefore some of the product.

Unless we can enact the Boxer-Biden bill to create a certification and labeling process that citizens can enforce, we cannot recommend that our members and the public can buy with confidence even tuna that is labeled "dolphin safe" .

We would like to emphasize that the labeling regime that would be established by the Boxer-Biden bill is far less complex than the "green label" programs that have been instituted elsewhere. In this context, the question is not complex. It is whether this product was obtained through methods which contribute to the death of dolphins. We know that the very act of setting on dolphins imposes at least a substantial risk of harm, either directly or as a result of injuries or stress inherent in the process itself. We also know that the setting of driftnets miles long in the seas will inevitably kill many non-target species that swim into it, including cetaceans.

The U.S. is again being looked to as a model for the rest of the world as consumers, companies and brokers in Europe are taking steps to protect themselves from the chance that they might purchase tuna that was caught on dolphin.

How the Boxer-Biden Bill Works

The bills require that tuna caught with purse seine nets set on dolphins or high seas driftnets be labeled to show that the tuna in the product was caught with methods that kill dolphins. Other tuna must (or may in the bill reported by the Merchant Marine Committee) be labeled "Dolphin-Safe". The tuna industry has testified in earlier hearings that each can is stamped with a code indicating fairly precisely which boat caught the tuna, and when and where. Agencies and the industry also know which boats are capable of using driftnets and are so outfitted. To ensure the accuracy of dolphin safe claims, the bills would take advantage of the current practice of requiring observers on board tuna boats in the ETP where dolphins are targeted for the tuna beneath them. These observers would certify that no sets were made on dolphin on any trip in or through the ETP. The importers or processors and those who distribute the products would then be responsible for maintaining the manifest system through to the wholesale/retail level. These provisions contain definitions and procedures that set the standards needed for any effective labeling requirement under this bill, existing labeling or trade law, or for any bill to ban the sale of certain dolphin unsafe tuna products.

As amended in subcommittee, the bill prohibits the importation of fish or fish products from nations using high seas driftnets after July 1, 1991 in the South Pacific and a year later worldwide in accordance with the schedule in the resolution sponsored by the Administration and adopted in the United Nations in December, 1989. We fully support this provision and it simply sets a deadline for implementing a ban that was authorized previously in Section 1371. A provision was also added which requires a report from the Secretary on the cost of carrying out the legislation.

As amended in the full Merchant Marine Committee, the bill would ban the sale of dolphin-unsafe tuna. In so far as it may jeopardize passage of the entire bill for largely procedural reasons, we recommend that this provision be placed in separate legislation.

The bills provide for civil and criminal penalties that can reflect the market value of the product that is the subject of the violation, as in other trade laws, and for citizen suit to enforce the provisions of the bill, as in many other health and environmental laws. The Merchant Marine Committee reduced the penalties and limited the market-based penalty to criminal violations.

It is also important to provide, as these bills have in different degrees, that any person can commence a civil suit seeking injunctive or other relief against any other person who is alleged to be in violation of the act, as noted above. This means essentially that if a conservation group or corporation such as Heinz is operating in good faith, and finds that because of a breakdown in the enforcement of the statute, that it is being harmed, that that entity or corporation ought to be able to seek civil remedies including penalties or injunctive relief.

The citizen suit provision in H.R. 2926 is also important in light of the trend of the current Supreme Court toward shrinking the standing to sue of citizens.

The Department of Commerce and the Food and Drug Administration would have joint responsibility given the need to include the jurisdiction and expertise of both from sea to shelf in specific regulations, inspections and enforcement.

These things are possible and incentives exist in the market to follow the Boxer-Biden approach as noted in previous testimony by Dr. Dennis King, doctorate in Marine Resource Economics from the University of Rhode Island:

- o Product identification numbers are already impressed into each can of tuna sold in U.S. markets which allows the product to be traced back to the location and date of processing. Tracing back to the vessel and the trip is just one step away.

- Processors who buy triploads of 1000 tons of tuna at around $1 million or buy transshipped lots of 2000 to 3000 tons of tuna at $2-4 million are very quality conscious. They always know where, when, and how each shipment of fish was harvested so tracking back to individual fishing areas, vessels and trips to identify dolphin-caught tuna may not be very difficult.

- Only 220,000 tons of tuna or about 9% of the global tuna harvest is supplied from dolphin fishing and this fishing takes place only in the ETP. Tracing this tuna involves tracing the equivalent of 220 purse-seine trips, not the entire world tuna harvest.

- European tuna fleets do not fish on dolphin and probably will not resist legislation to limit imports of dolphin-caught tuna from U.S., Mexico and other ETP fishing nations. The environmental movement should be successful at preventing the 'dumping' of dolphin-caught tuna in Europe.

Effective Compliance - Trip By Trip Certification

The certification and compliance system outlined in the Boxer-Biden bill is essential although additional details should be provided in regulations or in amendments.

It is far less expensive, far more reliable, and far less subject to abuse or confusion to label tuna on a trip-by-trip basis; that is, it is easier and much more reliable to certify the tuna as dolphin-safe only if it came from a trip which involved no sets on dolphin.

I will reiterate for the record what we have said in the past, that any attempt to allow labeling a percentage of the pack from a given trip as unsafe on the basis of the proportion of dolphin-caught tuna in the boat will be wrong and counterproductive.

Certain specific improvements in H.R. 2926 are needed. These improvements are largely embodied in S.2044, but there are additional provisions or improvements in existing sections which the Congress would do well to add.

Additional Certification Procedures

The Merchant Marine Committee made several changes in the Boxer certification procedures. These are largely workable, but a few comments are in order.

Boats, under 400 tons or not, currently fishing without setting on dolphins should be certified by the NMFS to be dolphin-safe sources only if they lack the equipment necessary for sets on dolphins. These boats must not have speedboats, helicopters, and must stipulate that they have not, nor will not set on dolphins. A spot gear monitoring program should be enacted to periodically check to maintain that none of these boats is capable of setting on dolphins.

Catch statistics on fish size should be monitored to reveal any anomalies and full documentation and analysis of fish catch by weight and size must be mandated on any boat traversing the ETP to get to the Western Pacific. Comparisons must be made to annual total yellowfin catch in the Western Pacific, and a gear inspection program must be maintained to ensure that none of the Western Pacific boats are equipped to set on dolphins.

If the "Federal Inspection for Seafood Healthfulness Act of 1990" bill is passed, its requirements and those of the Boxer-Biden Bill could be coordinated nicely, except that FDA specifically should be clearly given the lead instead of Agriculture generally, and the long list of exceptions to inspections be totally inapplicable to the tuna program. Specifically, Food and Drug Administration officials will already be inspecting the tuna canneries for health purposes and to ensure that the tuna is not "misbranded" (specifically, misbranded "under the name of another food," i.e. cod will not be labeled as trout). This program is to be developed by the Secretaries of HHS and Commerce, and the new inspectors can aid Commerce officials in cannery inspection for dolphin-safe labeling.

Retain the Citizen Suit Provision and Market-Based Penalty

The likelihood that this legislation will be enforced properly without the citizen suit provision is diminished in light of the increasingly stringent requirement that plaintiffs show direct and substantial harm in order to have standing to challenge even a clearly illegal practice. Without a citizen suit provision, given the small amount of tuna consumed by any one person or group, some courts may feel that Congress did not intend for consumers or conservationists to fall within the zone of interests protected to the extent that they can act to protect themselves. The very fact that in its written testimony Starkist asked the committee to strip the citizen suit provision from the bill is the very best evidence that that provision is essential. They have said that they support the Boxer-Biden bills and both have the kind of citizen suit provisions that will allow other firms or conservation groups with a strong case that the law is being violated to protect their interests. Now they propose to both strike that element and weaken the penalties.

The most important aspect of the penalties provision is that, tied to market value, they reflect the true value of the violation thus preventing any temptation to risk a relatively small penalty for a big pay off such as the increase in value per pound that occurs when "dolphin-unsafe" raw tuna becomes "dolphin safe" canned tuna.

We oppose both changes. We will not be a party to any agreement that offers rights without remedies or promises without penalties. We are in the process of settling the dolphin account now and effective citizen enforcement is an essential part of that settlement.

Reward Provisions

Among suggestions for improving the legislation is a substantial reward to anyone supplying information leading to, or contributing to, the conviction of, or assessment of a civil fine against, any person for violation of this act or regulations promulgated thereunder. This provision is particularly important to verify data in situations where information that can only be obtained from a small number of individuals who are privy to that information such as the crew of a tuna boat or those who unload it.

This kind of provision would be particularly useful in ensuring that observers are not coerced or bribed into certifying as dolphin-safe a trip which was in fact not dolphin-safe. We do not expect this to happen in light of the high quality of observer work we have seen to date and in light of the fact that such practices can incur criminal penalties.

Furthermore, the Congress might want to direct that a portion of the fines collected for a fund for the conservation of dolphins (Sec. 6 of Biden bill) be directed to fund research on more promising new technologies designed to enhance fishing for tuna in a way that is dolphin-safe.

Existing Unfair Trade Laws Provide Inadequate Protection

Notwithstanding the many reasons for enacting a mandatory labeling program, it may be argued that the proposed bill is unnecessary since existing law already provides adequate protection against the false labeling of tuna or tuna products as "dolphin-safe." Section 5 of the Federal Trade Commission Act ("FTC") provides that "[i]t shall be unlawful...to disseminate, or cause to be disseminated, any false advertisement--inducing the purchase of food, drugs, devices, or cosmetics." More important, under the Act, the Federal Trade Commission has access to injunctive relief and penal remedies.

There are two reasons why Congress cannot rely upon the remedies set forth in the FTC Act to prevent the mislabeling of tuna. First, to be actionable, a particular misrepresentation must be defined. With respect to the term "dolphin-safe," no standard definition exists. Under current law, therefore, any seller of tuna can advertise its tuna products as "dolphin-safe" without fear of prosecution for mislabeling. Second, assuming that Congress did adopt a statutory formula to determine which catch methods are dolphin-safe, present law does not require sellers of tuna to label their products. Consequently, in the absence of a new, mandatory labeling program, U.S. consumers will be left without the information necessary to make an informed choice as to the true environmental cost of how particular tuna was caught.

In sum, if Congress relies upon the remedies under existing law to prevent mislabeling, consumers will have little assurance that what they are purchasing as "dolphin-safe" is not actually caught with methods which injure or kill dolphins.

The Tuna-labeling bill is necessary to provide accurate information.

The use of mandatory labeling to inform the consumer has a long and successful history in this country that dates back almost fifty years. From health warnings required on alcohol and cigarettes to labels which identify the human health and environmental hazards posed by household, agricultural and industrial chemicals, Congress repeatedly has acted to establish national legislative programs to ensure that consumers are not hindered by inaccurate or absent information.

These labeling requirements have not been limited to the protection of human health. The Fair Packaging and Labeling Act, for instance, was passed in 1966 to provide consumers with accurate information as to the quantity of contents and to facilitate value comparisons. The law is administered by the Department of Health and Human Services for food, drugs, devices and cosmetics and the Federal Trade Commission for all other consumer products. In addition to quantity disclosures, the program requires clear identification of products and the name and location of the manufacturer. None of these general purposes or requirements are associated with public health and safety.

Other programs established by Congress to protect producers and consumers include the Textile Fiber Products Identification Act (1957), the Fur Products Labeling Act (1951), and the Wool Products Labeling Act (1939). The textile and fur laws apply to advertising, as well as labeling.

The proposed tuna-labeling bill before the Committee possesses many similarities to the purposes and structure of the programs listed above. It would require that all tuna products destined for market in the United States must be labeled to indicate whether the product was caught by a method known to harm dolphins.

There are several reasons why only a national legislative program such as this will provide accurate information to suppliers and consumers on how a particular tuna product was caught. First, labeling requirements for all tuna products destined for U.S. market must be consistent. The proposed tuna-labeling law would ensure uniform standards and definitions so that no matter the country of harvest, the meaning of "dolphin safe" would be the same. In the absence of such a law, on the other hand, a consumer cannot be certain that a "dolphin safe" label in fact means tuna caught using methods not harmful to dolphin. For instance, there are a number of possible ways to designate tuna as "safe" or "unsafe": (1) set by set using different holds to segregate tuna caught on dolphin from that which is not; (2) designating a percentage of the total landing "safe" or "unsafe" depending on what percentage of sets were made on dolphin; or (3) trip by trip, depending on whether any sets were made on dolphins. Therefore, Congress must prescribe the proper criteria for distinguishing the tuna catch-methods that protect dolphin from the methods that do not.

Ban Tuna Caught on Dolphin? It's Happening Through The MMPA

Some have asked whether the U.S. should ban the sale of unsafe-for-dolphin tuna. While many groups would approve of that result, the Coalition and its allies believe that such a measure should be sought through separate legislation so as not to jeopardize passage of the Boxer-Biden bill. Moreover, the application of existing law and market demand may make new legislation unnecessary for all practical purposes. This is because the Department of Commerce is expected to issue a determination under the MMPA's comparability provisions. As a result, much dolphin-unsafe tuna may soon be banned from U.S. market. **(It should be clear in the final determinations or findings, however, that once a nation's fleet is verified as fishing in a manner that is 100% dolphin-safe, tuna caught by that safe fleet in a safe manner would cease to be embargoed.** It would, of course, also have to be labeled under the Boxer-Biden Bill if that were passed. See also suspension suggestions below.)

The MMPA requires foreign nations to implement dolphin protection programs which are comparable to those of the United States and that the performance of their fleets be comparable with that of the U.S. tuna fleet. The importation of tuna from foreign fleets that have failed to meet this standard is likely to be banned by late summer of this year. It appears that all foreign fleets will be subject to this sanction. In addition to the special limits on the allowed take of the rarer eastern spinner and coastal spotted dolphins, next year under the current MMPA, instead of two times the dolphin mortality per vessel on the average, the general standard will be approximately 1.25 times the U.S. rate.

Although the U.S. total allowed catch should be reduced, the skipper performance standards and related requirements are also required to be met in comparable fashion by foreign fleets seeking to market tuna to us or our tuna-suppliers abroad, as part of the secondary embargo required by the MMPA.

Since the MMPA will most likely result in bans affecting these fleets, additional legislative bans would not be a significant change. We suggest the following package to encourage countries affected by the bans to continue working towards dolphin-safe fishing methods.

Conditions For Suspending the MMPA Ban

- **First, enact and implement the Boxer-Biden bill to have a workable and effective labeling regime;**

- **Second, NMFS must make the required determinations under the Act and impose the sanctions (except those who qualify for exemptions below) without delay;**

- **Exempt from the embargo dolphin-safe tuna only and that only on the condition that the exempt nation:**

  1) join in and remain an active member of IATTC or its program;

  2) have 100% observer coverage;

  3) continue improvement in the per vessel average and national fleet total in reducing dolphin mortality, remaining on schedule toward "0" dolphin take by the end of 1992;

  4) take part in an international program of research, development, and implementation of dolphin safe alternative methods and technologies;

o Fourth and finally, we must retain intermediary nation provisions of MMPA, at least concerning dolphin-unsafe tuna;

If all of these conditions are met, we should permit the continued importation of dolphin-safe tuna from those fleets which would otherwise be unable to export any tuna at all to the United States, including dolphin-safe tuna taken from the ETP through such means as setting on logs, fishing for skipjack, etc.

Observers, as assigned by IATTC, should be placed aboard boats whose nationality is other than their own, as we understand is the current general practice, and this alien-observer requirement should probably be applied to all IATTC participants. If the mortality rates have not improved to well below a comparable rate, according to the schedule then the embargo would continue. At that point, we should revoke the offending nation's exemption and reinstate a ban across the board on safe and unsafe tuna from those countries whose fleets were not meeting the standards as required under the MMPA.

This approach would provide an incentive to fish in completely dolphin-safe ways and provide incentive for those trips that were not completely dolphin-safe to at least comply with the best available technologies associated with setting on dolphins, much as we may abhor those practices.

A dilemma with respect to MMPA comparability results from the fact that the American kill totals may plummet to almost zero as U.S. fishermen switch to catching dolphin-safe tuna. If a few American boats remain and disregard dolphin saving techniques not specifically required the kill rate may rise. While this is unlikely, the trend should be monitored and additional performance requirements for skippers and boats, as well as the fleet-wide quota, should be set based on best available technologies for both foreign and domestic fleets. We suggest that legislation require that there be a concurrent reduction in quota related to the size of the U.S. fleet, or other similar criteria, to avert an inflation of the total kill allowed prior to the final recommended phase out in 1992.

New Legislation to Ban Dolphin Unsafe Imports Alone?

To ban the importation rather than the sale of certain products, regardless of whether similar standards have been imposed on our internal markets might run afoul of the General Agreement on Tariffs and Trade (GATT) standards (addressed below in this statement). It might reduce competition and indirectly subsidize continued setting on dolphins by American boats if their tuna were deemed not to be "imports" but merely internally marketed. This is one reason why the Merchant Marine Committee did not adopt the import ban approach.

To Apply Current Pelly Sanctions -- Whether and How?

In our opinion the provisions of the Pelly Amendment to the Fishermen's Protective Act could probably be used against nations whose nationals are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishing conservation program such as is conducted by the the Inter-American Tropical Tuna Commission.

The Inter-American Tropical Tuna Commission (IATTC) and program including its observers which record the take of dolphin and the practices of the fleets which fish under its aegis, are practices that are intended to conserve dolphins, according to the minutes of the Commission itself, as well as the "fishery" as a whole. Any nation whose fleet removes itself from the IATTC or in fact fails to cooperate with its program to reduce dolphin mortality may be considered to have diminished the effectiveness of that international conservation program. This might qualify that nation for certification under the Pelly Amendment which would then in turn allow the President to embargo fish products in a manner consistent with the GATT. This is precisely what is called for in the 1988 amendments to the MMPA.

Failure to be a member of such an international program was considered a "diminishment" for Pelly Amendment purposes, as we understand it, when Denmark was not a member of the body regulating North Atlantic Salmon and probably would have been certified had it not joined.

Several nations fishing the ETP are not members of IATTC now. However, we do want to encourage participation in the program as a primary goal.

Pelly and Tuna Taken With Driftnets

Concerning the taking of dolphin with driftnets, the United Nations resolution on driftnets, as approved by the General Assembly of the UN on December 22, 1989, notes the adoption by South Pacific Heads of Government of the Declaration on this subject at Tarawa on July 11, 1989 and the adoption by South Pacific states and territories of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific at Wellington, New Zealand, on November 24, 1989.

The resolution notes that some members of the international community have entered into cooperative enforcement and monitoring programs for the immediate evaluation and impacts of large-scale driftnet fishing on the natural resources of the high seas. Furthermore, the resolution calls for a moratorium on driftnet fishing in the South Pacific by July 1, 1991 and by July 1, 1992 on the rest of the high seas. Recently, Japan and Taiwan announced that they would comply with the first date in the resolution by suspending their driftnet fishing operations in the South Pacific. Although we are encouraged by this action, we must remember that the vast majority of their driftnetting fleets are still strip mining the seas of the North Pacific.

We support the enactment of the ban on the use of large-scale driftnets by the U.S. Fleet included in the current Magnuson Fisheries Conservation and Management Act reauthorization that is still pending. Although driftnets of the scale used by asian fleets are not used in the U.S., this amendment makes it completely clear that they are banned. This would make it even more likely that the Pelly Amendment sanctions, an additional tool that can be invoked, could be used to implement the U.N. resolution.

Section 1371(a)(2) of the Marine Mammal Protection Act has for years required a ban on the importation of fish products that are taken in a manner that are less protective than the methods authorized for the U.S. fleet. Under this section, all fish products from the large scale driftnet fleets of Japan, Taiwan and Korea could already be banned. Because of inaction by the Commerce Department on this issue, the Merchant Marine and Fisheries Committee included clarifying language which require the Department to take action against these fleets by invoking that sanction against them. This language must be included as an encouragement for the Japanese and and Taiwanese driftnet fleets not to return to the South Pacific and to discourage other driftnet fleets from entering the fishery. We strongly support the inclusion of this amendment in the Energy and Commerce Committee version of H.R. 2926 as well.

Although large-scale driftnet boats are easily discernible, the burden of proof must be shifted to the countries wishing to import tuna to the United States to prove that the tuna was not caught using the large-scale driftnets.

One of the major points of our testimony follows for the fact that we have for years anticipated this kind of regulatory action for both purse-seine and albacore tuna and in fact authorized it in the Marine Mammal Protection act. Therefore, it would not be at all unfair or inequitable to proceed legislatively to implement those sanctions and ban the importation of such products. Nevertheless, we return to the principle that authorized it in the Marine Mammal Protection Act. Therefore, it would not be at all unfair or inequitable to proceed legislatively to implement those sanctions and ban the importation of such products. Nevertheless, we return to the principle that legislation ensuring truth in tuna labeling, the right to know and know for sure, and the right to enforce the provisions of that act, are the first building blocks of this system for the protection of dolphins, consumer rights, and legitimate corporate interests.

Strengthening Pelly

Amendments should be made to the existing Pelly Amendment to allow more flexibility in developing effective tools for implementing international treaties relating to conservation of fisheries and endangered and threatened species. Since the statute in its current form is wholly discretionary, its original intent has been frustrated by administrative failure to implement sanctions.

In Appendix A, we recommend amendments based primarily on Rep. Wayne Owens' bill, H.R. 4289. We have used his language as a point of departure, but the concepts of mandatory phase in of sanctions and expansion to other goods with a nexus and a cause and effect relationship could be embodied in several different ways. In summary, our amendments would make follow-up action to a certification mandatory, but would allow the implementing authority to embargo not just fish and wildlife products, but also other products.

Halting Misdirected Subsidies and Aid To Encourage Transition

While we prescribe for other nations financial and technical aid, we sometimes destroy with one hand what we attempt to protect of their natural resources with the other. In his oath that many new physician still make, Hippocrates demands: "First, do no harm." Likewise we should ensure that none of our domestic or foreign aid programs are encouraging the taking of dolphins through the use of setting on them with purse seines or the use of driftnets.

This effective and equitable approach would deny development aid that would make the dolphin mortality problem worse or even deny any tuna-related aid except for that which is related to a resolution of the dolphin wasting problem or other problem at issue. Concerning aid that may directly harm endangered or threatened wildlife, and certain (non-tuna related) dolphins and small cetaceans, are so listed, we are now still defending a U.S.

District Court victory in Defenders of Wildlife v. Hodel (Lujan) (89-5192MN, D. Minn. 1989) holding that the Endangered Species Act requires that any agency consult with the Fish and Wildlife Service to ensure that any proposed action not jeopardize any endangered or threatened population even if it is one of the slightly more than 500 species on the U.S. list that is overseas. A circuit Court hearing on the Administration's appeal has been scheduled for May 17th.

We should establish the general principle that we will not export or import products or subsidize those activities that we would not allow to be sold or practiced here or by our citizens--from the spraying of DDT to the consumption of elephant ivory to the importation of tuna--if undertaken in disregard of standards comparable to ours. Improvements in Pelly sanctions will provide a better way to halt what is in essence the importing and exporting of extinction and waste.

Finding Alternative Fishing Methods —

Apart from other dolphin conservation efforts, alternative fishing methods should continue to be sought as they were mandated by Congress in 1981. Such alternative methods should not at this point be construed to include setting on dolphins with purse seines. The industry has argued for many years that it is in its best economic interest to release as many dolphins alive from their nets as possible, yet the problem with the purse-seine technology when used to capture tuna in association with dolphins is that the technology is inherently flawed.

When things inevitably go wrong, there is no way that fifteen men can control a net nearly a mile long and several hundred feet deep. The result is that many thousands of dolphins are killed in a small percentage of sets. (See Appendices, Croft Statement.)

We know far too little about the true impact of purse seining on dolphins to countenance any early return to that practice that could be called dolphin-safe. It may be possible to return in some instances to the traditional pre-1958 bait boats which took tuna in association with dolphin without harming the dolphins.

Tuna "Product"

Another important point is that the term "tuna product" must continue to mean any product, including non-food goods or goods not for human consumption. Considerable tuna finds its way into pet food and the conscientious consumer wants to avoid that as well.

* * *

Questions and Answers

I turn now to additional points in response to the questions often raised about this issue and to further comments concerning improvements in the legislation.

I. The impact of voluntary labeling on domestic and international efforts to protect dolphins:

o Voluntary labeling does not exempt countries from the stipulations of the MMPA. (nor, for that matter, does the Boxer-Biden bill). Labels, and the subsequent demand for dolphin safe tuna, will provide a new incentive for these countries to comply with the MMPA. The entire tuna fleet, both domestic and foreign, will be forced to find alternative tuna. This universal, equilateral transition from unsafe to safe tuna will help all tuna fishermen comply with the requirements of the MMPA and thus avoid an embargo of tuna products, as stipulated in the MMPA for countries that do not meet American standards of dolphin kills.

o The industry decision has sent an important signal which will be followed throughout the world. Reports from canneries in Thailand indicate that they intend to stop processing dolphin-caught tuna.

o Recently some tuna brokers in Italy suspended purchase of yellowfin from the ETP because of concern over the market for dolphin-unsafe tuna. Also, the two largest tuna companies in Italy have announced they will follow StarKist's lead in stopping any purchase or sale of dolphin-caught tuna.

o The new U.S. tuna industry purchasing terms have drastically reduced the markets relied upon by all boats in the ETP which had been setting nets on dolphins. There is no way that European markets, even if they choose to continue to import dolphin-caught tuna, can handle even close to the volume of tuna presently caught in the ETP by setting on dolphins.

For additional points see appendix B "The International Economics of Dolphin-Safe Tuna."

II. The impact of the new voluntary labeling policies on tuna fishing fleets in the ETP (US and foreign)

o Many Central and South American nations that purse seine in the ETP have access to coastal stocks of dolphin-safe tuna while also owning fleets of bait boats and small seiners which can exploit this easily accessible resource of dolphin-safe tuna that has suddenly and vastly increased in value.

o There is little doubt that in the coming months there will be fewer US and foreign boats operating in the ETP, and that the setting on dolphins by the remaining boats will be dramatically reduced.

o There is no credible evidence to suggest that foreign countries will add more dolphin-seining boats to their fleets, that any new countries will try to enter the ETP fishery, or that the kill rates on foreign boats will increase. While such hypothesizing is understandable, the opposite behavior is more likely, and is in fact already the result.

o Some expect that Mexico will voluntarily cease to export tuna to the US. Yet this does not exempt them from the requirements of dolphin protection. Under the comparability provision of the MMPA, they are still required to maintain an observer program under the IATTC and to comply with other performance requirements or risk extending or renewing the tuna embargo. Furthermore, failure to comply with the full set of IATTC provisions risks subsequent certification under the Pelly Amendment and thus the possibility of an embargo on all of their fish products. We should, however, work affirmatively with them by providing aid and contracts that lead to fewer dolphin deaths and more dolphin-safe tuna production.

III. Observations concerning the switch to Dolphin-safe tuna:

There are numerous methods and sources which have not been fully appreciated that are available to those who would fish for dolphin-safe tuna. Their use will ease the transition as noted below:

o The legislation is a great incentive, as it offers both reward and penalty to encourage improvement in the development of new dolphin-safe methods and technologies that will allow the harvest of the large yellowfin that will continue to associate with dolphins in the ETP.

o Some vessels currently fishing in the ETP (foreign and U.S. flag) will move to other areas of the world where the tuna do not associate with dolphins -- Western Pacific, Atlantic or Indian Ocean, etc..

o The ETP will continue to be a valuable fishery, too valuable to abandon. Dolphin-safe tuna will continue to be harvested in the form of "school fish" -- free swimming yellowfin, and "flotsam fish" -- yellowfin that congregates beneath floating objects.

o There is no compelling evidence that increased reliance on smaller yellowfin will result in depletion of the fishing stocks. [For additional information on this point, see Appendix C.]

o In addition to yellowfin and skipjack, there are many underutilized species of tuna that are in abundant supply in the ETP that will supply a valuable dolphin-safe commodity in the market. One such variety of fish which could potentially be used is known as "Blackies".

o New processing capabilities have already been tested and show promise. Currently there are two super seiners with flash-freezing capabilities aboard. This technology allows for on board processing in order to fill a valuable fresh fish market as the product is apparently so quickly frozen as to avoid a significant change in flavor and consistency. This technology should not be allowed to be used to circumvent the labeling requirement if large volumes are involved however-- thus should require that any fish to be sold at the retail level canned or purchased frozen by the retailer bear the appropriate label.

o We should condition the use of existing construction assistance cost sharing on the use of dolphin safe methods for any owner of the boat and require sale of the boat to be on the condition that any subsequent purchaser not fish on dolphins or with driftnets.

o We should condition such programs as the Saltonstall-Kennedy assistance similarly and direct such assistance to the development of dolphin safe fishing and production and marketing, if possible.

o We do not think that it will be too much of an economic hardship on these fishermen to switch to fishing for dolphin-safe tuna. They can and will pass on any small increase in their costs to the consumer -- likely to be only a few cents a can -- in light of the documented premium that the conscientious majority of consumers will pay. The Department of Commerce should track fully and report to Congress regularly over the next several quarters on the dynamics of the market so as to head off any price gouging or fixing blamed on false costs. The U.S. International Trade Commission has announced an investigation into competitive conditions affecting the U.S. and European tuna markets at the request of the Ways and Means and Finance Committees in March of 1990.

o For years, the premium price paid by canneries for the tuna that associates with dolphins has effectively blinded the fishermen to the possibilities that existed under their very noses. With the announced policy changes by the three canneries, there will exist additional economic incentives for the fishermen to continue to find additional supplies of dolphin-safe tuna in the ETP. Skipjack stocks are currently in good supply and will be able to provide some of the demand for dolphin-safe tuna. The IATTC has stated on numerous occasions that the skipjack in the ETP is an underutilized resource and could sustain increased catches.

o The National Academy of Sciences is in the process of evaluating several promising alternative fishing methods, including the use of fish aggregating devices, to increase catch in the ETP by dolphin-safe methods. The report is due to Congress in September, and may provide recommendations for federal or industry funding to develop such alternatives.

IV. A ban on unsafe tuna sales?

o A new ban bill may not be needed. A ban bill might be used to strengthen or complement the MMPA, however, as the labeling legislation does. It must not usurp the power already in the MMPA to regulate the foreign fleets, however, nor should it fail to incorporate a strong version of the intermediary nations provision of the MMPA and embargo "laundered" tuna, and perhaps include appropriate thresholds for certification and application of Pelly sanctions.

* * *

I would like to submit a few brief attachments for the record as Appendices, including a background statement by former observer and Dolphin Coalition Director Christopher Croft, if there is no objection.

Thank you, Mr. Chairman. That concludes my testimony.

Senator **Kerry**. Thank you very much, Ms. Davis.

Mr. Hauge.

STATEMENT OF KEITH A. HAUGE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, STARKIST SEAFOOD CO., LONG BEACH, CA

Mr. **Hauge**. Mr. Chairman and Members of the Committee, I am Keith Hauge, President and Chief Executive Officer of StarKist Seafood Company, an affiliate of the H.J. Heinz Company.

With your permission, I ask that the full text of my written statement be included in the record.

Senator **Kerry**. It is so ordered.

Mr. **Hauge**. StarKist appreciates the opportunity to participate in today's hearing regarding an overview of current efforts to protect dolphins, the impact of the recent decision by StarKist and other processors to market only dolphin safe products, and comments regarding S. 2044, the Dolphin Protection Consumer Information Act.

I would like to take this opportunity to thank Senators Hollings and Kerry for holding this hearing and Senator Biden and Representative Boxer, who have been leaders in the effort to provide the American consumer with dolphin safe tuna.

We particularly appreciate their support of our recently announced "dolphin safe policy," which does not allow the intentional encirclement of dolphin or the use of high seas driftnets in catching tuna.

StarKist, the only major American-owned tuna company, voluntarily announced its dolphin safe policy on April 12, 1990. The policy provides that StarKist will not purchase tuna caught in association with dolphin. All tuna purchased under the new policy will be labeled as "dolphin safe."

StarKist supports the enactment of S. 2044, the Dolphin Protection Consumer Information Act. The legislation is necessary to ensure that the voluntary actions of the canners, led by StarKist, will be continued, and a consistent approach to dolphin safe labeling will be in place.

StarKist was the first major canner to adopt a dolphin safe policy, which is comprehensive and in line in all material respects with the policy of S. 2044. The legislation will assure that all canners presenting dolphin safe label claims will be held to the same high StarKist standard.

In June, 1990, StarKist celebrated the delivery of the first cases of dolphin safe labeled tuna. Earlier, StarKist had identified product already produced at the time of the announcement which met StarKist's dolphin safe policy including all of our albacore or white meat tuna.

The reaction to StarKist's dolphin safe announcement on April 12 was immediate and positive. On the same day, StarKist's two largest competitors in the U.S. market announced plans to follow StarKist's lead. Environmental groups worldwide applauded StarKist's voluntary imposition of a ban on purchases of dolphin unsafe tuna.

We have already received thousands of letters and cards from around the country thanking StarKist for leading the move to dolphin safe tuna.

Since April 12, the French Tuna Canners Association announced that they will no longer purchase or sell dolphin caught tuna. Another positive development is the announcement by the Taiwanese of a substantial reduction in their gillnet fishing effort, as the market for this fish has been reduced.

Japan will suspend driftnet fishing in the South Pacific for the coming season.

StarKist has been the only major tuna company to regularly sell albacore tuna that has not been caught with driftnets. StarKist hopes that all nations will move immediately to end their use of driftnets once and for all.

Supplies of raw tuna have remained fully adequate, despite the imposition of the ban on dolphin unsafe tuna by StarKist and other canners.

I now turn to S. 2044, the Dolphin Protection Consumer Information Act. StarKist supports the proposed legislation. StarKist requests, however, that certain changes be made in the bill. Some of the following suggested changes have already been addressed in the House Merchant Marine and Fisheries Committee reported bill.

Of paramount concern is the need for the Federal legislation to be the single law on the issue of dolphin safe labeling throughout the 50 States and the possessions and territories of the United States. Accordingly, we urge Congress to add language to S. 2044, which would provide that no State can impose any requirement or penalty with respect to a dolphin safe tuna product that differs from the requirements of or penalties imposed by the legislation.

StarKist requests that the legislation be amended to provide that a certification must verify that at no time during the trip through the eastern tropical Pacific were purse seine nets intentionally deployed to encircle dolphin. It is clear to us that the U.S. consumer, educated by environmental groups, will not accept a lesser standard of dolphin protection.

StarKist urges consideration of including within the legislation an authorization for appropriation of funds for further research, testing, and development of dolphin safe tuna fishing methods, as well as for relocation allowances to encourage the use of fisheries in which tuna fishing does not pose a threat to dolphin.

Finally, appropriations for funding of Inter-American Tropical Tuna Commission observers for 100 percent of the foreign fleet operated in the eastern tropical Pacific would encourage all processors to adopt dolphin safe standards and facilitate compliance with the certification provisions of the legislation.

Thank you for the opportunity to appear before the Committee today.

[The statement follows:]

STATEMENT

KEITH A. HAUGE,
PRESIDENT AND CHIEF EXECUTIVE OFFICER
STARKIST SEAFOOD COMPANY,
AN AFFILIATE OF H. J. HEINZ COMPANY

Mr. Chairman and Members of the Committee,

I am Keith A. Hauge, President and Chief Executive Officer of StarKist Seafood Company ("StarKist"), an affiliate of H. J. Heinz Company, and I am pleased to be with you this morning. In attendance with me today are William M. Fallon, Vice President of Quality and Development and Mark V. Matera, Senior Attorney.

StarKist appreciates the opportunity to participate in today's hearing concerning S. 2044, the Dolphin Protection Consumer Information Act.

I would like to take this opportunity to thank Senators Hollings and Kerry for holding this hearing and Senator Biden, who, as you know, has been a leader in the effort to provide the American consumer with "dolphin safe" tuna. We particularly appreciate his support of our recently announced "dolphin safe" policy.

StarKist Dolphin Safe Policy

I will begin by explaining the "dolphin safe" policy announced a few months ago by StarKist and I will then review StarKist's progress in implementing that policy.

On April 12, 1990, StarKist announced the following voluntary policy:

> StarKist will not purchase, process or sell any tuna caught in association with dolphin. We will label tuna purchased under our new policy as "dolphin safe."

StarKist refuses to purchase tuna caught by the intentional encirclement of dolphin in a purse seine net in the Eastern Tropical Pacific fishery. StarKist also refuses to purchase any tuna caught with gill or drift nets.

StarKist began worldwide implementation of the new policy with respect to all tuna-related products upon the April 12 announcement.

StarKist's policy is being implemented as follows:

- For all large purse seiners operating in the Eastern Tropical Pacific that sell their fish to StarKist, StarKist is requiring that a government recognized observer be aboard the vessel and that the observer and the vessel's captain certify to StarKist that the catch is "dolphin safe."

- The large United States flag boats in the Eastern Tropical Pacific which wish to fish in a "dolphin safe" manner must carry an independent observer provided by the National Marine Fisheries Service. These observers are currently on the boats fishing "on dolphin" and record the "sets" made by targeting dolphin and the mortality rates. The certification procedure we have arranged with the National Marine Fisheries Services will utilize these observers, but we will only buy from vessels whose observers certify "zero" intentional encirclements of dolphin during the trip.

- Similarly, the Inter American Tropical Tuna Commission provides independent observers for the foreign flag boats in the Eastern Tropical Pacific. Currently, the Inter American Tropical Tuna Commission does not have observers aboard all boats operating in the Eastern Tropical Pacific, but we will require an on-board observer on every vessel desiring to sell to StarKist. The Inter American Tropical Tuna Commission certification method is the same as the National Marine Fisheries Services method.

- There are a number of small boats, U.S. and foreign, which are physically incapable of fishing "on dolphin," even though they have small purse seine nets. We have asked the National Marine Fisheries Services and Inter American Tropical Tuna Commission to provide a "registry" of these boats, updated on an annual basis, stating that the intended use of these boats will be for "dolphin safe" fishing. These boats are under 400 gross tons and generally 60 to 90 feet in hull length. Neither the National Marine Fisheries Services nor the Inter American Tropical Tuna Commission require on-board observers for these boats. We will only buy from these boats if they are on the National Marine Fisheries Services or Inter American Tropical Tuna Commission registries.

- Under this policy, in the event StarKist purchases from third parties frozen loins for processing or canned tuna products for resale, the tuna in the purchased loins or canned product will have to conform in all respects to the policy as though StarKist had directly purchased the raw tuna.

In June, 1990, StarKist celebrated the delivery of the "first cases" of dolphin safe labeled tuna. Earlier, StarKist had identified product already produced at the time of the announcement which met StarKist's dolphin safe policy, including all of our albacore (white meat) tuna. All raw tuna now being purchased by StarKist and all products produced with such tuna are dolphin safe.

Impact of Decision

The reaction to StarKist's dolphin safe announcement on April 12 was immediate and positive. On the same day, StarKist's two largest competitors in the U.S. market announced plans to follow StarKist's lead. Environmental groups worldwide applauded StarKist's voluntary imposition of a ban on purchases of dolphin unsafe tuna. We have already received thousands and thousands of letters and cards from around the country thanking StarKist for leading the move to dolphin safe tuna.

Since the announcement, the French tuna canner's association announced that French canners will no longer purchase or sell dolphin-caught tuna.

Supplies of raw tuna have remained fully adequate despite the imposition of the ban on dolphin unsafe tuna by StarKist and other canners.

The Legislation

I turn now to S. 2044, the Dolphin Protection Consumer Information Act.

StarKist supports the proposed legislation.[1] Indeed, StarKist led the tuna canning industry in adopting the dolphin safe policy. StarKist's voluntary adoption of "dolphin safe" labeling (a move which has been widely followed) makes enactment of the legislation more important than ever. Enactment of a consistent, enforceable regulatory framework will ensure that when a consumer reaches for a can of tuna, the "dolphin safe" label claim will be accurate one hundred percent of the time.

Not only was StarKist the first to adopt a dolphin safe policy, StarKist adopted a comprehensive policy which squares in all material respects with the policy of S. 2044. The legislation will assure that all canners making "dolphin safe" label claims will be held to the same high StarKist standard.

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[1] A bill substantially identical to S. 2044 was introduced in the House of Representatives as H.R. 2926. That bill has been significantly and positively marked-up by the House Merchant Marine and Fisheries Committee. Certain of the concerns discussed in this statement have been addressed in the current mark-up and StarKist would suggest that the Senate consider similar amendments to S. 2044.

StarKist requests, however, that certain substantive changes be made in the bill. As discussed in footnote 1, above, some of the following suggested changes have already been addressed in the House Merchant Marine and Fisheries Committee reported bill.

Preemption

Of paramount concern is the need for the federal legislation to be the single law on the issue of dolphin safe labeling throughout the 50 states and the possessions and territories of the United States. The specter of multiple state legislative responses to the dolphin/tuna issue need only be raised to demonstrate its dangers.

The harvesting of tuna in connection with dolphin is an interstate and international matter. Moreover, it will be more difficult to obtain foreign participation in dolphin safe efforts if the states are free to adopt their own approach to regulations on dolphin/tuna labeling.

Accordingly, we urge Congress to add language to S. 2044 which would provide that no state can impose any requirement or penalty with respect to a tuna product and dolphin that differs from the requirements of, or penalties imposed by, the legislation.

Penalties

In order for the legislation to fulfill its purpose, StarKist recognizes and endorses the need for penalties. We believe that the penalties should be stringent enough to encourage a processor to adopt responsible and verifiable controls to assure compliance with the federal statute. However, as presently drafted, the penalty provisions are quite harsh. In fact, the current bill appears to impose penalties even in the event of an unintentional violation of the law. StarKist urges the Senate to provide that only knowing and intentional violations of the law would result in penalties.[2]

Second, StarKist urges that the citizen suit provision be deleted from the bill. StarKist fears that a private right of action against members of the tuna industry would inevitably result in harassment. Alternatively, the provision should be changed to provide that only a suit to enjoin or compel the Secretary of Commerce to act is permitted. StarKist also requests that the attorney's fee provision for citizen suits be deleted.[3]

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[2] The House Merchant Marine and Fisheries Commission reported bill has adopted such a change.

Third, StarKist urges that penalty amounts not be based upon the volume of the canned tuna product involved in the violation. Regardless of the degree of care exercised by even the most responsible of tuna processors, the possibility exists that, through the unauthorized act of an employee or agent, the dolphin safe policy of a processor may be violated, leading to inaccurate labeling of product. The legislation is too onerous if penalties are so high that a failure to comply which does not result from the conscious act of the processor's controlling executives imparts severe financial or other penalties on the processor.

Accordingly, we urge Congress to amend the bill to limit the penalties for such violations to the value of the raw tuna which is the subject of the violation. StarKist also recommends that the annual amount of any such fines be capped at $1,000,000. The penalties which StarKist proposes are steep enough to insure that there is an economic disadvantage to violating the law, but not so high as to threaten the continued viability of a tuna processor.

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[3] The House Merchant Marine and Fisheries Committee reported bill has adopted positive changes with respect to the citizen suit provision as well.

StarKist further requests that the bill be amended to make it clear that the penalties it prescribes are the exclusive penalties available for a violation of the labeling law. As currently drafted, the bill is ambiguous as to whether a violation would also constitute a violation of the Food, Drug and Cosmetic Act.

Worldwide Application

StarKist believes that the legislation should limit the dolphin safe label to processors[4] which are dolphin safe around the globe and with respect to all tuna products. The bill in its current state would permit tuna processors that sell dolphin unsafe tuna in foreign or U.S. markets to nevertheless use the dolphin safe label in a U.S. market for a tuna product if that particular product is, in fact, dolphin safe. In order to use the leverage of the U.S. market to change tuna fishing methods (as opposed to merely changing canning and processing practices)

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[4] Defined to include parent companies and all direct and indirect subsidiaries and affiliates of the processors and their parents.

StarKist recommends that the bill be amended to prohibit dolphin safe claims by processors who are not dolphin safe worldwide.

Demanding a consistent standard is essential if the public purpose behind this legislation is to succeed. To do less is to fall short of the public's wishes and expectations.

Immunity

The bill would render a tuna processor liable even if the processor has relied in good faith on the certifications provided for in the legislation. If a processor is entitled to rely upon a certification (because the processor does not sell dolphin unsafe tuna in U.S. or foreign markets) and if the processor does, in fact, rely in good faith upon such a certification it seems only fair that the processor should not be penalized if it subsequently turns out that the certification is false or inaccurate. Similar immunity provisions with respect to reliance upon certain food guarantees are contained in the Food, Drug and Cosmetic Act.

Additional Provisions

StarKist requests that the legislation be amended to provide that a certification must verify that at no time during the trip through the Eastern Tropical Pacific were purse seine nets intentionally deployed to encircle dolphin. The current version of the legislation is ambiguous with regard to the certification requirements provided for in the Eastern Tropical Pacific.

StarKist urges consideration of including within the legislation an authorization for appropriation of funds for further research, testing and development of dolphin safe tuna fishing methods, as well as for relocation allowances to encourage the use of fisheries in which tuna fishing does not pose a threat to dolphin.

Appropriations for funding of Inter American Tropical Tuna Commission observers for 100% of the foreign fleet operating in the Eastern Tropical Pacific would encourage all processors to adopt dolphin safe standards and facilitate compliance with the certification provisions of the legislation.

Finally, StarKist urges that the legislation be amended to delete labeling requirements with respect to size, location and prominence and permit the comprehensive regulatory scheme under the Food, Drug and Cosmetic Act to set the requirements for dolphin safe labeling.

Thank you for the opportunity to appear before the Committee today.

Senator KERRY. Thank you very much, Mr. Hauge. We appreciate it.

Mr. Silva.

STATEMENT OF MANUEL SILVA, OWNER OF THE FISHING VESSEL "TRADITION," AND CHAIRMAN, BOARD OF DIRECTORS, U.S. TUNA FOUNDATION

Mr. SILVA. Mr. Chairman, Senator Breaux, I appreciate the opportunity to offer my comments on S. 2044 and on the recent decision by U.S. tuna canners not to purchase any tuna caught in association with porpoise.

My name is Manuel Silva, and I appear before you today not in my capacity as President of the United States Tuna Foundation, but as a fisherman and tuna vessel owner.

I am a fisherman and captain of ships since 1950. I presently own four U.S. tuna seiners: the *Sea Quest, Proud Heritage, Tradition,* and *Legacy.*

Over the past 20 years, I have occasionally appeared before this Committee, although I am certainly not comfortable in the role of witness.

Mr. Chairman, I speak for all of the U.S. tuna boat owners who have worked hard to comply with the mandate of this Committee for the protection of porpoises, as expressed in the Marine Mammal Protection Act. We are opposed to the legislation you are considering today.

The legislation supports the decision by U.S. tuna canners not to purchase unlawfully caught tuna. The canners' decision, based on questionable motives, at best, has already adversely affected our fleet and has led to the closing of two canneries in Puerto Rico, which relied on fish from the eastern tropical Pacific.

I say "questionable motives on the part of canners" because the so-called "dolphin safe policy" has already resulted in higher consumer prices for the product. Simultaneously, one canner has taken further advantage of the consumer by downsizing its can by approximately 3/8 ounce of tuna.

The real motives become even more focused when we find that the canners are now offering lower prices to the fishermen. The bottom line, of course, is that none of these recent actions by the canners has led to lower porpoise mortality.

In my opinion, the announced policy of the U.S. canners will have just the opposite effect of what this Committee intended by the 1988 amendments to the Marine Mammal Protection Act. Porpoise mortality will increase; reliable research and data collection will end; and tuna productivity will decline.

Scientists familiar with the eastern tropical Pacific porpoise fishery will agree that once the highly regulated U.S. fleet leaves this fishery, dolphin mortality will increase. Moreover, as pointed out by the most prominent international tuna scientists, if fishing is directed away from porpoise schools that carry the large tuna to free-swimming schoolfish that are of the young, juvenile tuna, the reproductive capability of yellowfin tuna will be adversely affected.

The recent action by the canners was taken even though the National Marine Fisheries Service, as we understand it, indicates that the porpoise population in the eastern tropical pacific number over 10 million animals and are growing at 4 percent each year. No stock is threatened or endangered within the meaning of the Endangered Species Act or under the Marine Mammal Protection Act.

S. 2044 is especially unfair to U.S. fishermen in light of the fact that this Committee, in 1988, declared that there had been dramatic improvements in porpoise safety by the U.S. tuna fleet. These improvements have resulted in a current safe release rate of 99.4 percent of those porpoise encircled.

If the U.S. fleet leaves the area, as they will have to do if this bill is passed, they will be replaced by far less efficient or dedicated foreign vessels. The policy by the U.S. tuna canners will not persuade Mexico or Latin American countries to cease their fishing activity. The need for food and employment in those countries is simply too great. And countries like Japan continue to welcome the quality, yellowfin tuna caught in this region.

We understand the main purpose of the 1988 Marine Mammal Protection Act amendments to be directed at reducing the foreign porpoise mortality. Yet, less than two years later, you are being asked to adopt a new policy which completely destroys any incentive for foreign fleets to improve their porpoise safety record.

Recently, the Inter-American Tropical Tuna Commission held its annual meeting in Washington, D.C. The tuna/porpoise issue was one of the main agenda items. All of the countries attending the meeting, which included every country that has flag vessels in the eastern tropical Pacific, agreed to hold a special follow-up meeting on this topic in September of this year. It was unanimously accepted that the tuna/porpoise issue had to be addressed and resolved through establishment of an affirmative international regime.

I would like respectfully to suggest several steps that this Committee should take in order to achieve the common objective of all of us at this hearing, the reduction of porpoise mortality.

You should reject S. 2044. It selectively treats the tuna/porpoise issue out of proportion to the real facts. It attempts to use Federal authority and money to support a private boycott of a legitimate American enterprise, tuna fishing.

If there is to be a label that is meaningful, it should read: "Caught in full compliance with the Marine Mammal Protection Act." Isn't this the intent of this Committee?

Secondly, we urge that you continue to rely upon the Marine Mammal Protection Act as the primary mechanism for regulating and reducing porpoise mortality. U.S. fishermen are, by far, the most efficient at safely releasing porpoise. This act cannot be ignored.

Thirdly is to require the Department of State to participate and support a new, international program under the Inter-American Tropical Tuna Commission or other multilateral body to reduce porpoise mortality by the international fleet. It is foolish to believe that a hungry and morally diverse world will not buy tuna caught on porpoise. We cannot impose extremist policies on other countries, particularly since the porpoise populations are neither threatened nor endangered and people in other countries need both jobs and food.

We must cooperate and not be confrontational.

Quite frankly, I am baffled by the lack of consistency on the part of Congress. Why pick on tuna and tuna alone by imposing a dolphin safe/dolphin unsafe label on the product? Every product produced by agriculture, the single human activity that kills more vertebrates than any other, should then have the label "vertebrate unsafe." This immense loss of vertebrate lives is caused by habitat destruction, habitat denial, the use of pesticides, et cetera and is right before our eyes. So then, why pick on tuna?

In my opinion, the fishermen are being treated unfairly.

Thank you very much.

[The statement follows:]

TESTIMONY OF MANUEL SILVA

BEFORE THE
U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

HEARINGS ON S. 2044
"DOLPHIN PROTECTION CONSUMER INFORMATION ACT OF 1990"

JULY 25, 1990

Mr. Chairman and members of the Committee, I appreciate the opportunity to offer my comments on S. 2044, the "Dolphin Protection Consumer Information Act of 1990", and on the recent decision by U.S. tuna processors not to purchase any tuna caught in association with dolphins, including tuna caught by the U.S. tuna fleet in compliance with the Marine Mammal Protection Act. In addition, the letter of invitation asked me to comment on the effectiveness of dolphin protection programs. My name is Manuel Silva and I appear before you today not in my capacity as President of the United States Foundation, but as a fisherman and tuna vessel owner.

I have been a fisherman, captain or vessel owner for over 45 years. I presently own four U.S. tuna seiners, the SEA QUEST, PROUD HERITAGE, TRADITION and LEGACY. The first two operate in the eastern tropical Pacific (ETP) and the latter in the south, central and western Pacific. Over the past twenty years, I have occasionally appeared before this Committee, although I am certainly not comfortable in the role of a witness.

Let me begin by stating that I and all other U.S. tunaboat owners who have labored hard to comply with the mandate of this Committee for the protection of dolphins, as expressed in the Marine Mammal Protection Act, are opposed to the legislation you are considering today. This legislation, and the related decision by U.S. tuna processors, led by the Chairman of H.J. Heinz, the parent of Star-Kist Foods, Inc., to boycott our lawfully caught tuna, has already harmed the 24 U.S. vessels that fished on dolphin in the ETP prior to April 12, 1990. Since the canner-environmentalist boycott was announced on April 12, at least 12 of those vessels have been sold or have moved to the South Pacific, or are in the process of taking one or the other action. Moreover, two tuna canneries in Puerto Rico, which relied on tuna from the ETP, have closed, making jobs even scarcer for Puerto Ricans. Without question, this public relations effort has injured the livelihoods of the little guys--independent boat owners and cannery workers--without any assurance whatever that dolphins will in fact be protected to any greater degree.

We and most fisheries experts know that, with the removal of the highly regulated U.S. fleet from this fishery, dolphin mortality will increase. Moreover, if fishing is directed away from porpoises schools to smaller school fish, the reproductive capability of the valuable yellowfin tuna will be affected, and the world will lose a significant source of protein. And this action is not being take to protect an endangered species, for the populations of dolphins in the ETP, according to scientists, are healthy and growing.

I want to make four basic points in my statement to you today. First, this legislation is extremely unjust to American fisherman in light of what this Committee in 1988 described as the "dramatic improvements" in protection of dolphins by the U.S. tuna fleet and our record.[1] The tuna/dolphin issue has been a foreign fishing fleet issue for sometime now, given that the U.S. fleet has a 99.4% safe release rate and foreign fleets account for over 80% of all dolphin mortality in this fishery. Just two weeks ago, Earth Island Institute recognized the "substantial improvement" in our fleet's performance under the Marine Mammal Protection Act in a letter to the Director of the National Marine Fisheries Service.[2]

Second, the boycott of fish caught on dolphin, even if S. 2044 passes, will allow companies the opportunity to gouge the misinformed consumer with higher priced tuna while less protection for dolphins results. Already, so-called dolphin-free tuna is being sold at $1.85 a can to take advantage of the emotional climate created by misleading facts spread by protectionist groups. We understand Star-Kist took the steps it

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1/ Report of the Senate Committee on Commerce, Science and Transportation on the Marine Mammal Protection Act Amendments of 1988 (Report No. 100-592, 100th Cong., 2d Session), page 7.

2/ This statement is contained in a letter written by Joshua R. Floum of the law firm of Heller, Ehrman, White & McAuliffe, attorneys for Earth Island Institute in litigation against the Department of Commerce over implementation of the Marine Mammal Protection Act.

did only after the marketing staff of H.J Heinz assured the board of directors that they would take another 10% share of the canned tuna "label" market and that the company can charge more for its tuna. We seriously doubt that American consumers will be getting their money's worth.

Third, dolphin mortality will increase with the departure of the highly regulated U.S. fleet from the ETP and replacement by far less careful foreign vessels. The U.S. company boycott of tuna caught on dolphin will not persuade Mexico or Latin American countries to cease this fishing activity--the need for food and employment in those countries is simply too great. And countries like Japan will welcome the quality yellowfin tuna to their markets. The U.S. can no more impose their sense of morality about dolphins on the world than India can stop Americans from eating the sacred cow.

Four, at the recent meeting of the Inter-American Tropical Tuna Commission (IATTC), the Director reported that moving fishing activity away from large yellowfin caught in association with dolphins to school fish will harm the reproductive capability of the yellowfin stocks and result in far fewer fish being caught.

We, the American fishermen, have been dismayed at the abandonment of our only buyers as a consequence of a distorted campaign against tuna purse seine fishing, without notice and, in certain instances, without concern for contractual obligations. We also dismayed at the desire of certain members of Congress who wish to embrace an emotional, extremist position and who do not even wish to hear the other side or admit that this is a complex problem that does not admit of a simple solution explained in a 30-second sound bite. We desire better treatment than that from this Committee, for we have done what you asked us to do under the Marine Mammal Protection Act, and more. Yet we sense many Members of Congress are prepared to abandon us.

I realize that the U.S. canners, opting for image rather than truth, have already bowed to the pressure campaign conducted by protectionist groups. The canners have agreed to take action rather than confront the groups that were smearing the good name of our industry. I question whether this type of campaign should motivate the Committee to endorse this boycott through passage of S. 2044. I hope this Committee will examine the real facts of this issue before rushing through a bad bill just to please a loud, well-funded group of protectionists. We are the minority here and we deserve your help.

Since April 12, a number of developments have occurred of interest to this Committee with respect to this issue:

1. U.S. vessels are moving out of the ETP fishery and two Puerto Rico tuna canneries have closed. About 10 smaller vessels will remain in the Eastern Tropical Pacific where they will try to fish school fish and on "logs". They do so with the knowledge that the nearby Latin American countries may refuse to sell them fishing licenses and may seize them within their 200-mile exclusive economic zones. Tuna fishing on dolphin generally

takes place outside the 200-mile zones of these countries, while school and "log" fishing takes place much closer to shore. The impending change in the Magnuson Act tuna juridical policy, recently approved by a narrow vote in this Committee, poses a new risk to these vessels.

2. Certain canners have informed U.S. vessels that they will pay less for tuna, notwithstanding the fact that 250,000 tons of yellowfin tuna has just been removed from the U.S. market. However, one canner was responsible enough to offer an incentive price for yellowfin tuna not caught in association with dolphin. So as prices for so-called "dolphin-safe" canned tuna are going up for the consumer, prices to the U.S. boatowner for that same tuna are going down. We get the feeling that someone is trying to put us out of business completely.

3. Several countries that are members of the IATTC, and some that are not, have agreed to a special meeting on the management of tuna caught in association with dolphin to examine ways to reduce mortality. We know that certain of these countries are outraged by the heavy handed attempts by U.S. canners and environmentalists to dictate fishing and environmental policies to these countries. Instead, we should be continuing to play a leadership role in their efforts to reduce porpoise mortality, rather than standing on the outside, shouting criticism at these efforts. The U.S. fleet should continue to participate in this fishery and continue to lead the way in saving dolphins.

4. We understand that recent estimates by the National Marine Fisheries Service indicate that the dolphin populations in this region number over 10 million animals and are growing at 4% each year. No stock is threatened or endangered, within the meaning of the Endangered Species Act, or depleted under the Marine Mammal Protection Act.

I would like to suggest several steps that this Committee should take in order to achieve the common objective of all of us at this hearing--the reduction of dolphin mortality.

One, we respectfully ask that you not approve S. 2044. This bill attempts to solve a complex environmental problem by reducing it to a black and white issue, to our detriment. It selectively treats the tuna/dolphin issue as a problem way out of proportion to the real facts and to reality. Please do not use Federal authority and money to support a private boycott of a legitimate American enterprise--tuna fishing.

Two, continue to rely on the Marine Mammal Protection Act as the primary mechanism for regulating and reducing dolphin mortality. U.S. fishermen are, by far, the most efficient at safely releasing dolphins, although the foreign fleets are improving their performance every year. In 1989, the U.S. fleet captured 68,000 tons of tuna from dolphin-associated schools. Replacement of that catch by foreign flag vessels which have a kill rate over three times of that of U.S. vessels can only increase mortality.

Three, ask the Department of State to participate and support a new international program, under the IATTC or other multi-lateral body, to reduce porpoise mortality by the international fleet. It is naive to believe that a hungry and morally diverse world will not buy tuna caught in association with dolphins. We cannot impose extremist policies on other countries, particularly given that dolphin populations are neither threatened or endangered, and people in other countries need both jobs and food.

Four, we ask your support in getting the State Department to begin a new effort to gain access for our vessels in other areas of the world. For example, the government should immediately commence negotiations with countries in West Africa to permit our vessels to operate in their waters. The French and Spanish tuna seiners are already operating in this area. Negotiations to secure licenses and operating bases in countries of the Indian Ocean, such as the Seychelles, should also begin. After all, that region, along with the south, central and western Pacific, has been touted as an area of dolphin-safe tunas.

In the long term, I believe the policy announced by H.J. Heinz and the other processors will backfire; the fishery in the ETP will not disappear, research on how to reduce porpoise mortality by the U.S. industry will cease, mortality will go up and productivity of the yellowfin stocks in the ETP will drop.

Of a more immediate concern to me are the financial losses that will be incurred by not only the vessels in the ETP but those in the western Pacific. In a single move, the major processors, H.J. Heinz, Van Camp Seafood and Bumble Bee, have rendered the nets of the vessels in the ETP inadequate. New nets are needed for fishing in the western Pacific. Not only will the vessels have to remove their Medina safety panels and replace them with lighter webbing, but they will also have to lengthen, deepen and rehang their ETP nets. The estimated cost for modifying an ETP net is between $150,000 and $250,000, depending on what you have to modify, or $475,000 for a new net.

Also, many vessels that do not currently have them will have to purchase larger power blocks and stronger, faster pursing winches to handle the new gear for the western Pacific and/or Indian Ocean. A larger hydraulic system may also be required. The instant demand for webbing, hydraulic pumps and motors, power blocks and pursing winches is more than the suppliers can presently provide on such short notice. The time spent awaiting delivery of parts and installation could easily equal two fishing trips. The vessels should be compensated for these unexpected monetary losses, plus the loss of revenue because of time lost converting gear and running to the western Pacific and/or Indian Ocean.

The addition of another 15 U.S. vessels, a 42.8 percent increase, to the 35 vessels already operating in the western Pacific will decrease by some amount the catch rates and hence the total catch by U.S. vessels in the area. The revenue lost to these vessels through reduced catch rates may in turn be offset by a rise in the price per ton that they will receive for "dolphin-safe" tuna. However, if the offset does not fully compensate for the loss caused by decreased catch rates, a scheme to compensate the original 35 vessels that were fishing in the Treaty area should be devised. As of today, the canners are trying to force down the price of dolphin-safe tuna they purchase from our vessels, meaning even greater losses to our fishermen.

Those vessels that continue operating in the ETP will probably lose revenue also as they no longer will be harvesting the valuable high-priced larger yellowfin, i.e., over 20 pounds, caught in association with dolphin. A method for compensating these vessels should also be formulated.

With respect to those vessels in the ETP that choose to fish schoolfish and logfish, they too should be given financial compensation for lost revenues. The catch rates will be lower, and the trips longer, without access to tuna/dolphin fish. This should be closely monitored and if the price of the prime dolphin-safe fish offsets this loss, no compensation should be received.

Quite frankly, I am baffled by the lack of consistency on the part of Congress. Why pick on tuna and tuna alone by imposing a "dolphin-safe"/"dolphin-unsafe" label on the product? Every product produced by agriculture, the single human activity that kills more vertebrates than any other, should have the label "vertebrate-unsafe" on its label. The immense loss of vertebrate lives is caused by habitat destruction, habitat denial, the use of pesticides, etc. It is right before our eyes and nothing has been done about it. In my opinion, tuna fishermen are being treated unfairly.

In summary, let me say that the tuna-dolphin issue can be divided into two parts: (1) emotion, and (2) management, utilization and conservation. If the Congress and processors take our fishermen to task on an emotional basis, so be it. Most certainly, neither can justify their stances on a management basis. As one scientist recently stated:

> "When you're dealing with the environment, there are emotional concerns, political concerns. Sometimes the concern taken least into account is science."
>
> (NEWSWEEK, April 1990)

Thank you.

RESPONSES OF MANUEL SILVA TO QUESTIONS POSED BY SENATE COMMERCE COMMITTEE

1. Q: As of April 12, the U.S. tuna fleet has been subject to the tuna canners' decision to refuse any tuna caught in association with dolphins--

Can you describe for the committee what has happened to the U.S. tuna fleet since the canner boycott was announced?

A: Of the 24 vessels then operating in the Eastern Tropical Pacific Ocean, where tuna is caught in association with dolphins, 11 have continued to do some fishing on dolphins and the remainder have either shifted their fishing elsewhere or are up for sale. I believe at least 4 boats are in the process of being sold. A number of the vessels have applied for licenses to fish under the South Pacific tuna treaty. At present there are at least 51 license applications for that area. Only 50 licenses will be issued. U.S. vessel owners are exploring other fishing opportunities off Africa and in the Indian Ocean. In short, for the U.S. fleet operating in the Eastern Tropical Pacific, the April 12 canner boycott decision was incredibly disruptive of fishing practices that have been followed for more than 20 years.

What has happened to the price of fish that the U.S. boatowners are being offered?

A: The world price of yellowfin tuna caught on porpoise dropped dramatically, although fish is being sold in Europe. Prices offered to U.S. fishermen for so-called "dolphin-safe" tuna also declined , which was surprising given that an annual harvest of yellowfin tuna in the amount of 250,000 tons was taken off the market. We have seen very strong pressure by domestic canneries to hold the price of "dolphin-safe" tuna down--hardly an incentive to use to catch "dolphin-safe" tuna.

How has the decision to refuse this tuna affected you personally?

A: I immediately lost a market for three of my vessels. I am now trying to sell one of them and searching for alternative fishing areas. The need to make all the necessary operational changes will result in considerable new expenses for me and result in lost fishing time. The drop in prices will also hurt my business. The decision is also dismaying to me as someone who has complied with the Marine Mammal Protection Act. I see big business and emotionally based publicity undercutting my livelihood, and I do not see fewer dolphins being killed by the foreign fleet.

Would the effect of a tuna labeling program on the U.S. fleet be any different if it were mandatory rather than voluntary? Please explain.

A: None whatever because the U.S. fleet is quite easy to police if either the canners or the government decide to do so. In either case, we presume the tuna labeling program you refer to is one that requires so-called "dolphin-safe" tuna to be identified on the can. And in either case, we do not believe anyone in the U.S. will buy "dolphin-unsafe" tuna for sale in the U.S. We presume that U.S. tunaboats, if they so choose, can still fish on dolphin and sell to Japan, Korea, or Italy, so long as they comply with the Marine Mammal Protection Act. The label is simply a mechanism for assisting in a private boycott of tuna caught in association with dolphins, a policy decision we believe the U.S. Congress should not embrace for the reasons stated in my testimony before the committee. Simply because it is enforceable does not mean it is either fair or good conservation policy.

2. Q: The success of a U.S. tuna labeling program in preventing dolphin mortalities is premised on the importance of access to the U.S. market by both domestic and foreign tuna fleets.

What do you think will be the reaction of the foreign tuna fleet to a U.S. tuna labeling program? Do you believe that foreign fleets will continue to catch tuna by setting on dolphin?

A: There is no question in the minds of those who truly understand this business that foreign fleets will continue to fish on dolphins. The only real result of the canner boycott would be that the U.S. fleet will no longer be engaged in this activity. I was recently able myself to sell tuna caught on dolphin to Italy, although for a low price. Tuna is a world wide food commodity and is consumed by countries that do not embrace the philosophy behind the boycott. Whatever environmental groups might say, other countries will not give up the jobs and food that comes from tuna fishing.

Where will they sell their fish?

A: Countries such as Panama, Peru, Ecuador, Costa Rica, and Mexico, and others who might fish in the region, can sell their fish in their home markets. In addition, they can sell their fish in Italy, Spain, Japan, Korea, and Taiwan, to name other large consumers of tuna.

3. Q: The primary purpose of the tuna labeling legislation is to prevent dolphin deaths. How would you propose we prevent dolphin deaths?

A: For domestic fleet, the best mechanism has clearly proved to be the Marine mammal Protection Act. For foreign fleets, an international program is essential, one that gains adherence to the methods used by American fishermen.

4. Q: Do you think U.S. vessels can survive economically on log and school fish in the Eastern Tropical Pacific?

A: For the large vessels, no. Some smaller vessels might be able to survive.

Senator **Kerry**. Thank you very much, Mr. Silva.

Let me say to you that we have a vote now that has begun, which will bring all Senators to the floor for the proceedings regarding Senator Durenberger. And so, both Senator Breaux and I are going to have to adhere to that call momentarily, which I regret enormously, because I do have some questions.

I would like to try to get a couple of them in very quickly. I think they will hold this a little bit and we will try to do that.

Let me say also at the outset, Mr. Silva, that I want you to understand that this Committee has labored long and hard to try to find a delicate balance on this issue. I have worked very closely with Senator Breaux. I want it clear on the record that there is no allegation out of this Committee or out of the Congress, nor even I think out of any of the proponents of this legislation, that there has not been a good faith effort by our fishermen and enormous sacrifice by them in many cases in order to adhere to the standards of the Marine Mammal Protection Act. It is very clear from the numbers of porpoises that are being taken that there has been progress.

But, as I said at the beginning of the hearing, it is the American consumer and voter who ultimately decides how you measure progress and what they want to define as progress. Clearly, a significant proportion of Americans have come to the conclusion that they want either to not eat tuna or to eat tuna that is caught dolphin free.

It is perfectly fair and legitimate and I think even laudable that a company decides it wants, out of very legitimate and bona fide motives, to appeal to that particular market. That is the American way. There is nothing abnormal about it and I don't think there is anything disparaging about it.

But I think there is a larger issue here. If the principal leverage of the very act you have just suggested we ought to be adhering to in order to implement our goals, is marketplace sanction, you are either telling us that, by not being able to embrace the large marketplace sanction the companies have voluntarily put on this, our own Marine Mammal Protection Act's strongest incentive does not work—you see, there is a contradiction there—or you are saying that these companies have somehow taken it further than we meant to go, because they are really applying the same leverage we set up, which is the marketplace sanction.

Do you follow me?

Mr. **Silva**. I follow you. Did you want me to comment?

Senator **Kerry**. Yes, absolutely.

Mr. **Silva**. I think by, number one, abandoning the Marine Mammal Protection Act, that would be our downfall. This is because once we are taken away from that, you will have runaway people that will be catching these fish in the eastern tropical Pacific. That is guaranteed, sure.

Senator **Kerry**. I would like to have a response to that by any of you who are seated there because that is a principal issue here.

Ms. **Davis**. I would like to respond to that.

The United States is the largest consumer of tuna in the world. Who are these foreign vessels going to sell their tuna to? Not to

StarKist. Not to VanKamp seafood, and after October, very probably, not to Bumble Bee. That leaves a few smaller companies.

They are currently selling it to Italy. Italy has become the new dumping ground for it, but they are getting a very low price for it. And Europe has been taking incremental steps to not become a dumping ground for dolphin-tainted tuna.

So it does not seem very feasible to me to go out slaughtering dolphins if they can't sell it to anybody.

Mr. SILVA. Well, what this move has done is fish is being purchased by both Spain and Italy in abundance and, indeed, at a very low price. Now, the yellowfin tuna from the Indian Ocean is being bought at almost twice the price for fish that is being sold to them in the eastern tropical Pacific. This is all caused by this maneuver, which causes a very unfair situation.

That part of the market will change. I am sure of that. It is a supply and demand situation.

Senator KERRY. Senator Breaux, did you want to take a quick turn before we leave for the floor? We are under the gun here.

Senator BREAUX. Well, you know, this is a very important issue and this is very important legislation. I really think it is unfair to the witnesses to give them 30 seconds to respond. I don't know what the solution is. You are under the same restrictions as I am.

Senator KERRY. Well, I don't disagree with Senator Breaux at all. I am very uncomfortable with the constraints under which we are operating.

I am perfectly happy to work out an accommodation, but I don't know what will be feasible.

Senator Breaux, can you return after the floor proceeding? I know Ms. Davis has a plane to catch. I would be perfectly happy to come back after the proceedings, but I have no way of knowing how long they are going to last.

The second alternative is to submit questions in writing. I am open to any suggestion. There is no desire to truncate this. This issue does need exploration, and I would be much happier with some continuation. The problem is that we are really laboring under Senate constraints and we must be on the floor.

Senator BREAUX. I would imagine that all of our witnesses are from out of town, so I guess they have the same commitments to get back home. I really don't have a suggestion.

I would really like to have some time for questions, but I don't know how to resolve that problem.

Mr. SILVA. Well, as for me, I didn't fly a long way. My time is your time.

Mr. HAUGE. I will be here tomorrow, Senators. I had planned to be here tomorrow anyway for other purposes.

Senator KERRY. Let me just converse with the Senator.

Senator BREAUX. I have no questions of Ms. Davis.

Mr. SILVA. Mr. Chairman, may I make one small comment, because you are talking about the majority of U.S. consumers, et cetera, and I don't know much about that.

Senator KERRY. Excuse me, but would you just suspend for one moment here. I want to see if we can resolve this.

Senator **Breaux**. We cannot have meetings with this floor process is going on. We cannot have a Committee meeting while the Durenberger proceedings are on the floor. We are prohibited.

[Pause.]

Senator **Kerry**. I'll tell you what we'll try to do. I would like to resume the hearing as soon as the Durenberger proceedings are over. It could be less than an hour, but I don't think it would be too much more.

Senator **Breaux**. Mr. Chairman, I would add that I have no questions for Ms. Davis. I admire her and I respect her opinion, and I admire her dedication and commitment to what she believes in. But I don't have any questions for her.

I disagree with her. I think she understands that. I have no questions for her, so if she has to leave, I don't want to hold her back.

Senator **Kerry**. Let me suggest this.

Ms. Davis' plane I gather is not until later this evening. If it is possible to wait around for a while——

Ms. **Davis**. Yes.

Senator **Kerry** [continuing]. We will return here immediately after the Durenberger proceedings are over. We will simply recess this hearing until that time. I think this issue is important enough to try to pursue it.

Thank you.

We stand in recess.

[Whereupon, at 3:35 p.m., the National Ocean Policy Study recessed, to reconvene upon the call of the Chair.]

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